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CROWN PROCEEDINGS ACT, 1947¹

SINCE at least the thirteenth century the rule has been that the Crown cannot be sued in its own courts. Furthermore, when the hardship of this rule was mitigated by the development of the petition of right as a means of proceeding against the Crown with the fiat of the Crown, the maxim that 'The King Can Do No Wrong' prevented that remedy being available for torts. A Crown Proceedings Committee was appointed in 1921² to consider the position, and in 1927 produced a draft Bill, the main object of which was to put the Crown, so far as may be, in matters of litigation in the same position as the subject.

Nothing was done to facilitate the passage of this Bill through Parliament, and it was only when in 1946 the House of Lords in *Adams v. Naylor*³ and the Court of Appeal in *Royster v. Cavey*⁴ drew attention to the unsatisfactory state of affairs that steps to remedy the position were taken. The present Lord Chancellor introduced a Bill which received the Royal assent on July 31, 1947, under the title of the Crown Proceedings Act, 1947.

It is not the purpose of this article to decide whether the policy adopted by the Act of extending the private law concepts of agency to the Crown is the right one, or whether a more radical solution on the lines of the French system of *contentieux administratif* should have been attempted. It is proposed only to make a few comments upon some of the provisions of the statute, and incidentally, to consider to what extent it achieves its object, in the words of Viscount Jowitt, of putting 'the Crown, so far as may be, in matters of litigation in the same position as the subject, so that a subject who wants to bring an action against the Crown may proceed as though he were proceeding against another subject'.⁵

I. CONTRACTS

Section 1 provides as follows :—

'Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have

¹ 10 & 11 Geo. 6, c. 44.

² (1927), Cmd. 2842.

³ [1946] A.C. 543.

⁴ [1947] K.B. 204.

⁵ Vol. 146. No. 39, Hansard, col. 51, on the second reading in the House of Lords.

been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.'

Proceedings by way of petition of right are abolished by section 13 of the Act.

The effect of section 1 is that a subject cannot sue the Crown in contract always, but only when he could previously have proceeded by petition of right. This retention of the former limitations on the right to sue for breach of contract is unfortunate not merely because the limitations are substantial, but also because they are all of uncertain extent. These limitations affect the following matters.

(a) *The right of a servant of the Crown to enforce a contract of service against the Crown.*⁶

A member of the armed forces cannot sue for breach of contract of service⁷ nor can he recover arrears of pay,⁸ because control of the armed forces is a royal prerogative. A civil servant cannot ordinarily sue for wrongful dismissal because there is an implied term in his contract that he is dismissible at pleasure.⁹ It has been decided, however, that a contract with a civil servant embodying terms inconsistent with his being dismissible at pleasure is enforceable if sanctioned by statute.¹⁰ The Privy Council (*per* Lord Atkin) in *Reilly v. R.*,¹¹ expressed the opinion that a civil servant could enforce express terms in a contract not having statutory sanction, but there is no decision to that effect binding on English courts; indeed, the trend is in the opposite direction.¹² Nor is it settled whether a civil servant can sue for arrears of pay. In *Lucas v. Lucas and High Commissioner for India*,¹³ the court refused to grant a garnishee order in respect of pay due to a civil servant on the ground that the servant himself had no legally enforceable right to the pay. The value of the decision is open to question because

(i) earlier cases reaching the opposite conclusion were not cited¹⁴;

⁶ See 61 L.Q.R. (1945), p. 240. D. W. Logan, 'A Civil Servant and his Pay'.

⁷ *De Dohse v. R.* (1886), 3 T.L.R. 114; *Mitchell v. R.*, [1896] 1 Q.B. 121.

⁸ *Leaman v. R.*, [1920] 3 K.B. 663.

⁹ *Shenton v. Smith*, [1895] A.C. 229.

¹⁰ *Gould v. Stuart*, [1896] A.C. 575.

¹¹ [1934] A.C. 176.

¹² *Denning v. Secretary of State for India in Council* (1920), 37 T.L.R. 138; *Rodwell v. Thomas*, [1944] K.B. 596. See *Carey v. Commonwealth* (1921), 30 C.L.R. 132, for an Australian decision that a civil servant could sue for allowances under a service agreement.

¹³ [1943] P. 68.

¹⁴ *E.g.*, *Bushe v. R.* (1869), *Times Newspaper*, May 29; *Sutton v. Att.-Gen.* (1923), 39 T.L.R. 294.

- (ii) the decision can be supported on the point (not taken in the case) that the particular rule of the Supreme Court under which the garnishee proceedings were taken did not bind the Crown;
- (iii) the case mainly relied on was a Scottish one not binding on our courts¹⁵;
- (iv) the following distinction between the position of members of the armed forces and civil servants was not made clear, namely, that prerogative rights prevent the former from recovering arrears of pay, whereas the reason for the limitation on the right of the civil servant is public policy. Although public policy may well justify an implied term that the Crown may dismiss at pleasure, it is difficult to see why it should prevent a civil servant from suing for services rendered.

- (b) *All contracts made by the Crown are subject to an implied condition that the necessary funds are granted by Parliament.*

Although this statement receives unhesitating and unqualified approval in the textbooks on constitutional law, its root, *Churchward v. R.*¹⁶ cannot be accepted as a reliable authority for the proposition. In the contract considered in that case, there was an express term requiring parliamentary sanction for the contract, and the rule seems to depend on obiter dicta of Slee, J.,¹⁷ which obiter dicta were in conflict with the views of Cockburn, C.J., in the same case.¹⁸ There is no subsequent binding authority for the proposition. Moreover in Australia, the dicta of Slee, J., have been uncompromisingly rejected.¹⁹

- (c) *The Crown cannot by contract hamper its future executive action.*

The authority for this is *Rederiaktiebolaget Amphitrite v. R.*,²⁰ a decision in a court of first instance which neither cited any authorities in support, nor has ever since been followed and applied. The decision has been severely criticised, for example, by Sir William Holdsworth,²¹ and its limits remain doubtful.

- (d) *Quasi-contract.*

In *Brocklebank, Ltd. v. R.*,²² the Crown denied that a petition of right was available when the plaintiffs, instead of claiming in

¹⁵ *Mulvenna v. The Admiralty*, [1926] S.C. 842.

¹⁶ (1865), 6 B. & S. 807.

¹⁷ P. 857.

¹⁸ P. 847.

¹⁹ *Bardolph v. New South Wales* (1935), 52 C.L.R. 458.

²⁰ [1921] 3 K.B. 500.

²¹ 45 L.Q.R. (1929), p. 166.

²² [1925] 1 K.B. 52.

tort for money wrongfully obtained from them by a servant of the Crown, sought to sue for money had and received. The point awaits decision, but it would seem that the recent decision by the House of Lords that in such circumstances, the plaintiff is not waiving the tort but merely pursuing an alternative remedy should prevent the action from coming within the scope of the former tortious immunity of the Crown.²³

II. 'OR MIGHT HAVE BEEN ENFORCED BY A PROCEEDING PROVIDED BY ANY STATUTORY PROVISION REPEALED BY THIS ACT.'

The statutory provisions referred to in this phrase contained in section 1 are those which, by including expressions such as 'the Minister may sue and be sued' allowed proceedings to be brought against the Minister without using a petition of right. These provisions, being no longer needed, are repealed by the repealing section of the Act. In *Graham v. Commissioners of Public Works and Buildings*,²⁴ recently followed in *Minister of Works and Planning v. Henderson*,²⁵ it was decided that even without a 'sue and be sued' clause proceedings could be brought against an incorporated department for breach of contract. Since the repealing section of the Act contains no reference to those statutes which incorporate departments but do not also include 'sue and be sued' provisions, it seems that the Act leaves untouched the right to sue those incorporated agents of the Crown, e.g., the Minister of Works. To that extent section 1 fails to achieve its object of requiring all proceedings against departments to be brought in accordance with the Act and not otherwise.

III. 'NOTHING IN THIS ACT SHALL APPLY TO PROCEEDINGS BY OR AGAINST, OR AUTHORISE PROCEEDINGS IN TORT TO BE BROUGHT AGAINST, HIS MAJESTY IN HIS PRIVATE CAPACITY'²⁶

The Sovereign would be regarded as appearing in his private capacity in respect of a contract entered into on his own personal behalf or on behalf of his household. Although there are no reported cases in which the Sovereign has appeared in that capacity, his liability was recognised by the Petitions of Right Act, 1860, which provided special machinery for such actions. That Act being repealed by the 1947 Act, it is no longer possible for such actions to be brought against the Sovereign in accordance with its provisions. Since the Act of 1860 did not repeal the antiquated procedure used before 1860, but only furnished alternative procedure, the question arises

²³ *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 at p. 19. For a contrary view see Winfield, *Torts*, 3rd ed. (1946), at p. 81, note (b). And see introductory chapter on *Remedies Against the Crown* by J. H. Morgan to *Public Authorities and Legal Liability*, by G. H. Robinson (1925).

²⁴ [1901] 2 K.B. 781.

²⁵ [1947] 1 K.B. 91.

²⁶ Section 23(1).

whether proceedings can now be taken against the Sovereign in accordance with the old procedure. Although section 13 abolishes petitions of right, it does so 'subject to the provisions of this Act'. The remarkable result seems to be that the Sovereign in his private capacity can only be sued by petition of right, using the rules in force before the Act of 1860 was passed, and that he cannot be sued at all in tort.

IV. TORTS

Section 2 (1) provides as follows :

'Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject :—

- (a) in respect of torts committed by its servants or agents;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
- (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.'^{27 28}

(a) The proviso to section 2 (1) enacts that the Crown shall not be liable unless 'the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate'. This proviso seems to be based on a misconception of the principle of vicarious liability.²⁹ Uthwatt, J. (as he then was) has shown that even where the servant acts within the scope of his employment, the liabilities of the servant and the master are not necessarily one and the same.³⁰ Suppose, for example, that a driver of a government vehicle negligently knocks down his wife. She cannot sue her husband, but it is clear from the decision in *Smith v. Moss*,³¹ that had his employer not been the Crown, she could have sued that employer. Since the proviso prevents an action being brought against the Crown unless one could have been brought against the servant, it follows that the wife has no remedy.

If the sole purpose of this proviso is to prevent the Crown from

²⁷ The Crown is not liable for breach of what in the case of a subject would be a common law duty unless that duty falls within the categories set out in ss. 2 (1) (b) and 2 (1) (c).

²⁸ Section 40 (4) provides that 'where any property vests in the Crown by virtue of any rule of law which operates independently of the acts or the intentions of the Crown, the Crown shall not, by virtue of this Act, be subject to any liabilities in tort by reason only of the property being so vested . . . '.

²⁹ This is the second occasion in three years that Parliament has apparently failed to appreciate the nature of vicarious liability. The definition of 'fault' in s. 4 of the Law Reform (Contributory Negligence) Act, 1945, does not provide for vicarious liability in cases where the duties of the master and of the servant are not coincident.

³⁰ *Twine v. Bean's Express, Ltd.*, [1946] 1 All E.R. 202 at p. 204.

³¹ [1940] 1 K.B. 424.

being liable where acts of State would be a defence to its servant, then it need not have been couched in such wide terms.

(b) Statutory Liabilities of the Crown.

Nothing in section 2 (1) imposes on the Crown any liability for breach of statutory duties. Section 2 (2) provides that the Crown shall be liable for breach of statutory duty if the statute binds both the Crown and persons other than the Crown and its officers. However, section 40 (2) provides (inter alia) that, except as therein otherwise expressly provided, nothing in this Act shall 'affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament'. The result is that tortious liabilities of a statutory nature do not bind the Crown unless either the particular statute or this Act provides to the contrary.³² The Act does provide that Part II of Law Reform (Married Women and Tortfeasors) Act, 1935 and the Law Reform (Contributory Negligence) Act, 1945 shall bind the Crown. The following statutes do not seem to affect the Crown. The Employers Liability Act, 1880, imposes restrictions on the field of application of the rule of common employment. The Crown presumably remains free from those restrictions whenever it pleads common employment.³³ Nor will the obligation imposed by the Housing Act, 1936 on landlords of certain houses to see that houses are reasonably fit for human occupation bind the Crown as landlord. Most important of all, it would appear unlikely that the Fatal Accidents Acts bind the Crown, with the result that if A is killed by the negligence of a driver of a government vehicle, A's relatives will have no remedy under the Fatal Accidents Acts against the Crown.

(c) Section 2 (6) provides that the Crown shall be liable only for the torts of those officers directly or indirectly appointed by it and paid out of the Consolidated Fund or certain other specified funds. Parliament, anxious to end the uncertainty prevailing at common law as to who is within the immunity, has provided a rigid definition. This definition is too narrow to include all public officials who have no employer other than the Crown vicariously liable for their torts. Decisions such as *Stanbury v. Exeter Corporation*³⁴ show that where public officers, although appointed by the local authority, have duties cast upon them directly by the

³² The retention of this presumption in favour of the Crown seems unjustified particularly when it is noted that s. 31 (1) provides that the Crown can 'take advantage of the provisions of an Act of Parliament although not named therein'. For a particularly wide interpretation of this presumption in favour of the Crown see *Cooper v. Hawkins*, [1904] 2 K.B. 164, where criminal proceedings under the Locomotives Act, 1865, against a Crown servant for driving a locomotive at an excessive speed failed because the Act was presumed not to bind a Crown servant; contra, s. 121 (2), Road Traffic Act, 1930.

³³ Section 150, Factories Act, 1937, expressly provides that its provisions shall bind the Crown.

³⁴ [1905] 2 K.B. 838. *Quare*: Can the Crown be liable for torts of servants loaned to it? Cf. *Farthing v. R.*, [1948] 1 D.L.R. 385 (Canada).

law, the local authority is not liable for torts committed by them in carrying out those duties. Such officers, of which, perhaps policemen are quantitatively the most important,³⁵ are outside the definition in section 2 (6), and no one is vicariously liable for their torts.

Section 3 makes the Crown liable for infringements by its servants or agents of patents, registered trade marks and copyrights. This section was an addition to the Act made in Committee in the House of Lords. Since the definition of 'servant or agent' in section 2 (6) only governs section 2, the Act provides no definition of servant or agent for the purposes of section 3. Presumably, the vague common-law rules must be applied.³⁶

(d) Section 40 (2) (e) extends to the Crown in its capacity as highway authority the rule that a highway authority is not liable for non-feasance. The extension by the Trunk Roads Act, 1946, of the Crown's control of highways makes this section more important.

V. POST OFFICE

Section 9 (1) is as follows :

'Subject as hereinafter provided, no proceedings in tort shall lie against the Crown for anything done or omitted to be done in relation to a postal packet by any person while employed as a servant or agent of the Crown, or for anything done or omitted to be done in relation to a telephonic communication by any person while so employed; nor shall any officer of the Crown be subject, except at the suit of the Crown, to any civil liability for any of the matters aforesaid.'

Section 9 (2) adds :

'Notwithstanding the provisions of section thirteen of the Post Office Act, 1908, proceedings shall lie against the Crown under this subsection in respect of loss of or damage to a registered inland postal packet, not being a telegram, in so far as the loss or damage is due to any wrongful act done or any neglect or default committed by a person employed as a servant or agent of the Crown while performing or purporting to perform his

³⁵ *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364. Cp. *Lewis v. Cattle*, [1938] 2 K.B. 454; *Rodwell v. Minister of Health*, [1947] 1 All E.R. 80.

³⁶ See Vol. 23, *L.Q.R.*, p. 12: 'Liability for Acts of Public Servants', by W. Harrison Moore. A body is an agent of the Crown when it is part of the general government of the country. It might be asserted that the two most important tests to be applied to new *ad hoc* bodies are (1) Is the body a substitute for private enterprise? (2) Is it under such control of a Minister as to be his agent? According to this test public corporations of the commercial type such as the National Coal Board are not agents of the Crown, but those of the social service type, which must obey any directions of the Minister and are not substitutes for private enterprise, are agents of the Crown at common law. On the other hand, s. 3 of the Town and Country Planning Act, 1947, expressly provides that the functions of the Central Land Board and of its servants and agents are to be exercised on behalf of the Crown. No such provision appears in the other recent statutes establishing public corporations, so that it is probable that their servants are not Crown servants.

functions as such in relation to the receipt, carriage delivery³⁷ or other dealing with the packet.'

The amount recoverable is not to exceed the market value of the registered packet in question. The section incorporates the common law presumption of liability on the part of the bailee when goods the subject of the bailment are lost or damaged.³⁸

Two controversial points are raised by the section. Firstly, although the rule laid down in *The Winkfield*³⁹ that the bailee can sue a third party, e.g., the employee of the Crown, for the whole value of packets lost by the negligence of that third party is retained, the right of the owner of the packet to sue the negligent Crown servant is taken away. It is suggested therefore that if the postmaster tore up a customer's letter in his presence, the customer could not sue the postmaster. This the Attorney-General denied in Committee in the House of Commons⁴⁰ on the ground that it would be outside the course of the employment. Since section 9 only refers to anything done 'while employed as a servant or agent of the Crown' and does not use any expression such as 'within the scope of and in the course of his employment' it seems very doubtful whether the Attorney-General's statement is correct. Secondly, to limit the amount recoverable to 'market' value will sometimes cause hardship. Although to make the Crown liable for all consequential damage is unreasonable, it does seem that in such cases as where a deed is lost, the replacement rather than the market value would be a more just measure of damages.

VI. ARMED FORCES

Section 10 prevents a member of the armed forces suing either the Crown or another member of the armed forces for personal injury suffered by him while on duty, or, even if not on duty, while on premises for the time being used for the purposes of the armed forces, if the alleged tort has been committed by a member of the armed forces while on duty. There is a similar immunity if death or personal injuries are caused in consequence of the condition of such premises or equipment or supplies. In short, where a member of the armed forces is injured in circumstances which would be attributable to service for purposes of pensions, his common-law right of action against another member of the armed forces, or his right to sue the Crown is taken away. The Act, therefore, is retrogressive in taking away common-law remedies that previously existed against both members of the armed forces and post office employees.

Section 10 refers to 'death or personal injury' and no other heads of damage. This phrase, no novel one in legislation, has

³⁷ The preposition 'of' appears to have been inadvertently omitted here.

³⁸ See proviso to s. 9 (2).

³⁹ [1902] P. 42.

⁴⁰ Vol. 439, No. 140, Hansard, July 11, 1947, col. 2633.

been interpreted in the case of the Workmen's Compensation Acts to extend to nervous shock.⁴¹ On the other hand, if the tort is one which in its nature can hardly result in personal injury, the right to sue both the Crown and the member of the armed forces responsible is unaffected. Defamation, trespass to land and torts within the rule in *Rylands v. Fletcher* are obvious examples. Presumably, too, a soldier can sue even in negligence for damages to his property, or for any other damage not being 'personal injury'. It is very doubtful whether common employment will be available as a defence to the Crown, where conscripts are concerned.⁴²

The appropriate service department is authorised to issue a conclusive certificate, if satisfied that it is the fact, certifying whether a person was or was not on duty, or premises were or were not used for the purposes of the armed forces. In the absence of a certificate, the court decides the issue, and it always decides whether 'the act or omission was not connected with the execution of his duties as a member of those forces' for the purposes of the proviso to section 10 (1).⁴³

VII. PREROGATIVE AND STATUTORY POWERS

Section 11 (1) provides that nothing in Part 1 of the Act shall extinguish or abridge the prerogative or statutory powers of the Crown. Section 11 (2) authorises the appropriate service department to furnish a conclusive certificate to the effect that an act was necessary for any purpose mentioned in section 11 (1), where 'it is material to determine whether anything was properly done or omitted to be done in the exercise of the prerogative'. Despite the certificate, the courts will decide whether any particular prerogative has any legal existence or not. Although both statutory and prerogative powers are saved by the section, a conclusive certificate cannot be given where it is material to determine whether anything was done in the exercise of a statutory as distinct from a prerogative power.

VIII. DECLARATORY JUDGMENTS

Section 23 (2) preserves the right to obtain declaratory judgments against the Crown, a right established in *Dyson v. Att.-Gen.*⁴⁴ That case raised doubts whether a declaratory judgment was

⁴¹ *Yates v. South Kirby Collieries, Ltd.*, [1910] 2 K.B. 538; *Ex p. Haines*, [1945] K.B. 183.

⁴² See *Alexander v. Tredegar Iron and Coal Company, Ltd.*, [1945] A.C. 286 at p. 302, for similar expressions of doubt in the House of Lords whether the doctrine would apply to a workman involuntarily directed into a particular employment by virtue of an Essential Work Order.

⁴³ The member of the armed forces responsible is personally liable in such an event.

⁴⁴ [1911] 1 K.B. 410; [1912] 1 Ch. 158.

available where the matter might eventually be the subject of a petition of right. Farwell, J., for instance said ⁴⁵:

‘It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right.’

No subsequent case has finally resolved the doubt, although in *Bombay and Persian Steamship Navigation Co., Ltd. v. Maclay*,⁴⁶ Rowlatt, J., said ⁴⁷:

‘The machinery of *Dyson v. Att.-Gen.* cannot be used to pre-judge the issue of what may have to be adjudicated upon in a petition of right as to a money claim against the Treasury.’

Section 23 (2) only embraces relief obtainable if the Act had not been passed. As with section 1 the uncertainties of the pre-Act law remain, and in particular it is not clear whether a declaratory judgment as to the interpretation of a contract with the Crown can be obtained.

One contested issue seems to have been settled. In the past the Attorney-General has sometimes refused to be joined as defendant to a declaratory action.⁴⁸ His right to withhold his fiat does not appear to have been discussed by the courts. Since the definition of ‘civil proceedings by or against the Crown’ in section 23 (2) includes actions of this type, it seems that the provision of section 13 that ‘all civil proceedings by or against the Crown in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise’ makes the fiat of the Attorney-General no longer necessary in such actions.

IX. MANDAMUS

Section 40 (5) leaves unaffected the rules governing mandamus, so that it will still be unavailable against the Crown.⁴⁹ Section 21 (2) confirms the rule that an order of mandamus cannot be made against a Crown servant acting as agent of the Crown. It is to be regretted that these serious restrictions on the user of mandamus have not been removed, for they hinder control by the courts of the acts of the Executive.

X. INJUNCTION

There are rare but not very reliable cases to support the view that at common law injunctions may be granted against government departments,⁵⁰ but no authorities to suggest that injunction could

⁴⁵ Page 421.

⁴⁶ [1920] 3 K.B. 402.

⁴⁷ Page 408.

⁴⁸ See C. K. Allen, *Law and Orders* (1945), p. 63, and the evidence of Mr. H. A. Hill before the Committee on Ministers' Powers; *Minutes of Evidence* (1932), p. 76, ss. 1041-1044.

⁴⁹ *R. v. Powell*, [1841] 1 Q.B. 352.

⁵⁰ *Rankin v. Huskisson* (1830), 4 Sim. 13; *Ellis v. Grey* (1833), 6 Sim. 214.

ever be obtained against the Crown. Section 21 allows an order declaratory of the rights of the parties to be made whenever, had the proceedings been between subjects, an injunction could have been granted. Since that same section provides that in 'proceedings against the Crown' an injunction shall not be granted, and section 23 (2) provides that any reference to 'civil proceedings against the Crown' includes actions against 'any Government department', it is clear that an injunction is no longer obtainable against a government department. This, too, may cramp the development of our administrative law. It is noteworthy that in Australia, injunctions are freely granted against government departments.⁵¹

XI. JURISDICTION AND PROCEDURE

Latin informations, English informations, writs of *capias ad respondendum*, writs of *subpoena ad respondendum*, writs of appraisement, writs of *scire facias*, proceedings for the determination of any issue upon a writ of extent or of *diem clausit extremum*, and writs of summons under Part V of the Crown Suits Act, 1865 are abolished.⁵² All civil proceedings by or against the Crown are to be instituted and proceeded with in accordance with rules of court and not otherwise. Section 15 authorises proceedings by or against the Crown to be instituted in a county court, subject to any enactment limiting the jurisdiction of a county court. Section 51 provides machinery whereby an Order in Council may be made to allow Crown proceedings to be brought in other courts, such as the Liverpool Court of Passage and the Salford Court of Record. Sections 19 and 20 preserve the Crown's right to choose the venue of proceedings to which it is a party.

XII. JUDGMENTS AND THEIR ENFORCEMENT

A judgment for or against the Crown may include costs, and the court may award interest on debts and damages.⁵³ The judgment itself is to carry interest.

Section 25 provides that a court awarding judgment against the Crown shall issue a certificate of the order made and that 'the appropriate Government department shall . . . pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon'. What remedies are available to a plaintiff unable to obtain satisfaction of a judgment against the Crown is not clear. Section 25 (4) provides :

'Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid,

⁵¹ *Att.-Gen. v. Williams*, [1913] S.R. (N.S.W.) 295.

⁵² Section 13 and First Schedule.

⁵³ Section 24.

and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs.'

Although section 2 (2) renders the Crown liable for breach of statutory duty, it does so only where that duty binds persons other than the Crown and its officers. It seems, therefore, that there is no legal means of enforcing a judgment against the Crown or a government department.

XIII. DISCOVERY

At common law, when the Crown is a party to a suit it cannot be required to give discovery of documents at all, *i.e.*, it cannot be compelled to disclose what documents relevant to the litigation are in its possession. Distinct from this rule is that forbidding the disclosure of information by Ministers of the Crown where to do so would be contrary to public policy or detrimental to the public interest or service. This latter rule was confirmed by the House of Lords in *Duncan v. Cammell Laird & Co., Ltd.*⁵⁴ It was further held in that case that the Minister's objection to production ought to be conclusive and that the judge should not himself look at the documents before ruling as to their production.⁵⁵

Section 28 of the Crown Proceedings Act provides that the Crown 'may be required by the court to make discovery of documents and produce documents for inspection'. The section continues:

'Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.'

and

'(2) Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.'

The effect, therefore, is that under the Act the court is empowered to order the Crown to give discovery. On the other hand, both in litigation to which the Crown is a party and in suits between private individuals documents will not be produced if a Minister of the Crown certifies that to do so would be injurious to the public interest. The rule laid down in *Duncan v. Cammell Laird & Co., Ltd.*, that the Minister's decision should be conclusive, is retained in the Act.

⁵⁴ [1942] A.C. 624.

⁵⁵ For criticisms of this decision see Vol. 58, L.Q.R. (1942), pp. 31, 436.

XIV. LIMITATION OF ACTIONS

The provisions of the Limitation Act, 1939, are untouched by the Bill. It has previously been decided that Crown servants are public authorities for the purposes of the Public Authorities Protection Act, 1893 and the Limitation Act, 1939.⁵⁶ Section 30 (2) confirms this by providing :

‘ . . . nothing in this Act shall prejudice the right of the Crown to rely upon the law relating to the limitation of time for bringing proceedings against public authorities.’

FOREIGN TORTS

It is surprising that the Act contains no provision excluding foreign torts from its operation. An action will lie here against the Crown for a tort committed abroad if the act is not justifiable by the law of the place where it has been committed.⁵⁷

One consequence of the Act is that a plaintiff injured either in Scotland or England by a tort of the Crown, can sue in the courts of either country.

XVI. COMMENCEMENT AND RETROSPECTIVE OPERATION

Section 54 (2) provides that the Act shall come into operation on such day, not later than January 1, 1948, as His Majesty may by Order in Council appoint.⁵⁸ Section 12 (1) provides that Part I, which contains the substantive law, shall be deemed to have had effect as from February 13, 1947.⁵⁹

Section 36 provides :

‘ Save as otherwise expressly provided, the provisions of this Act shall not affect proceedings by or against the Crown which have been instituted before the commencement of this Act ; and for the purposes of this section proceedings against the Crown by petition of right shall be deemed to have been so instituted if a petition of right with respect to the matter in question has been left with a Secretary of State for submission to His Majesty before the commencement of this Act.’ The effect of these provisions can be summarised as follows.

(a) *Proceedings instituted before February 13, 1947.*

The Act has no application.

(b) *Proceedings instituted after the commencement in respect of a cause of action arising after the commencement of the Act.*

The substantive and procedural rules of the Act apply.

⁵⁶ *The Danube II*, [1921] P. 183; *Western India Match Co., Ltd. v. Lock*, [1946] K.B. 601.

⁵⁷ It is interesting to note that U.S.A. in the Federal Tort Claims Act, 1946, excludes from its operation ‘ any claim arising in a foreign country ’.

⁵⁸ The Crown Proceedings Act, 1947 (Commencement) Order, 1947, S.R. & O. 1947, No. 2527, provided for the Act to come into force on January 1, 1948.

⁵⁹ The date on which the Bill was first ordered to be printed.

- (c) *Proceedings instituted after the commencement in respect of a cause of action arising after February 13, 1947.*

Section 12 applies with the result that the action must be brought in accordance with the substantive and procedural rules of the Act.

- (d) *Proceedings instituted between February 13, 1947 and the commencement in respect of a cause of action arising after that date.*

The effect of section 12 is that the substantive provisions contained in Part I apply. Section 1, in Part I, provides that proceedings shall be taken 'in accordance with the provisions of this Act', whereas section 36 provides that 'save as otherwise expressly provided the provisions of this Act shall not affect proceedings by or against the Crown which have been instituted before the commencement of this Act'. Only if section 1's terms are an express provision overriding section 36 (and this seems the more reasonable conclusion) will the procedural provisions of Parts II, III and IV apply.

- (e) *Proceedings instituted after February 13, 1947, in respect of a cause of action arising before that date.*

The wording of the section is ambiguous, but it seems likely that section 12 will confer a right of action in accordance with the Act in such circumstances.

HARRY STREET.

SOCIAL IMPLICATIONS OF THE SMALL LOAN LAWS OF THE UNITED STATES

THE small loan law as developed in the United States is a device which seeks, through regulation of cash loans, to protect the necessitous borrower from usurious practices. In its basic philosophy it casts a cloak of protection about the institution of the family. In its method it provides a process by which small cash loans may be made and interest charged sufficient to afford a reasonable profit to the lender, and no more.

All but five of the States of the Republic have such regulatory laws, now closely approaching uniformity in their provisions.¹ Continuous effort is being carried on in the remaining jurisdictions to enact such a statute.

But in nine of the States with regulatory statutes, the law—for one reason or another—is largely ineffective²; and in three more—Nevada, Arizona and Delaware—it is still far from satisfactory. As such statutory provisions regulating the internal affairs of the State fall within the legislative prerogative of the States rather than of the federal government, it is only by separate and uniform enactment by the forty-eight legislatures that complete coverage can be had.

The nature of these laws is best set out by tracing the history and the reasoning of their development. Until early in the present century the several States relied wholly upon the statutes already on their books limiting interest to a definite maximum, usually 6 per cent. Inasmuch as small loans cannot be handled on a business basis at such a low rate, illegal practices in lending small sums at exorbitant rates became general: salary buying, garnishee process, and like practices resulting finally in positive efforts to suppress the evil.

Massachusetts passed a law in 1911 imposing some important restrictions. As early as 1907 the Russell Sage Foundation—a philanthropic trust—began to make field surveys of conditions in the consumer credit field, reaching such conclusions by 1916 as to bring out the first draft of a proposed uniform small loan law for State adoption.³

¹ Montana, N. and S. Dakota, Kansas and South Carolina. Montana reports a new statute as this article goes to press. See a serviceable pamphlet (No. 37) of the *Pollak Foundation for Economic Research* (6th ed., Nov. 1, 1945), Jaffrey, N. H.

² Alabama, Arkansas, Delaware, Georgia, Mississippi, Tennessee, Texas, North Carolina and Wyoming.

³ A compact and able account of this evolution of the uniform law may be found in *Law and Contemporary Problems*, Duke University, Durham, North Carolina, Vol. 8, No. 1, Winter 1941, Hubachek, pp. 108-145.

Under the leadership of this Foundation the movement for enactment of this proposed law was pressed, with the result that five States soon legislated, adopting the uniform law at least in its fundamental provisions.

From 1916, when the first draft was adopted, until the present time, six more drafts have been perfected as experience has revealed loopholes and other imperfections in practice. Though State adoption of these subsequent drafts has lagged greatly behind their issuance and much remains to be done to effect the complete uniformity desired, it may be asserted now that the major battle for protection of the necessitous borrower has been won. The illegal lender, known in the vernacular as the 'loan shark', has been driven into unregulated territory and his usual subterfuges headed off. The public has definitely taken a hand against him.

In the usurer's place has come a group of young business men who pose and who function as the poor man's banker, dealing with him strictly on a business basis; but dealing fairly, under the watchful eye of the several State banking departments who are charged with supervision under the law.

THE SEVENTH DRAFT OF THE UNIFORM LAW

The last draft of the law as proposed to the States provides that no person or agency shall make a cash loan of \$300 or less at interest without first having been licensed by the State Banking Commissioner. That functionary is required to investigate the circumstances of each applicant for a licence as to the fitness of the applicant, etc. Such licensee must possess and retain throughout the life of the licence at least \$20,000 in liquid assets. He may have but one place of business for each licence; nor may he change his place of business without approval by the Commissioner. The Commissioner may examine a licensee's business at any time and must do so at least once a year. The licensee must keep competent records, open to the Commissioner, and must make an annual report in form prescribed by the Commissioner.

Interest charges are limited to three per cent. a month on that part of the unpaid principal of a loan not in excess of \$100 and two per cent. a month on any remainder of such unpaid principal balance. Doubling of loans to increase the rate of charge is forbidden. Any excess charge knowingly made voids the contract and prevents the lender from any recovery.

The licensee must hand the borrower a printed copy of the provisions of the law relating to rates of charge (section 13); must give him a receipt for each of his payments specifying the payment made and the balance yet to be paid.

False advertising is forbidden, and all attempts at evasion are considered loans, as for instance: the loan, forbearance, use or sale of credit, money, goods or things in action; the use of

collateral or related sales or agreements to sell; receiving or charging compensation for goods or services; and the real or pretended negotiation, arrangement or procurement of a loan through a third person. Any sale or assignment of wages are considered small loans.

All the tricks known to such a trade have been used in the interval of thirty years of trial; so that the law in its present form has become explicit, as each subterfuge has been revealed and stopped.

This is a new day for the small income man who must borrow. It is the purpose of this article to discuss the social implications of this departure in legislation. What does it do toward cleansing the money lending business; but more particularly, what does it do for the working man and his family? How much of this borrowing is necessary? What is the economic setting in which such loans are made? Can and should the lender do anything more for the borrower than just the lending of credit?

GROWTH OF BUSINESS UNDER THE UNIFORM LAW

Following the classification set up by the board of governors of the Federal Reserve System the small loan companies who operate under the uniform laws here under review, were, at the beginning of 1947, carrying something over thirty per cent. of the total of consumer instalment loans, as judged by the outstandings at that date—\$620,000,000 out of a total of \$2,024,000,000.⁴ The remainder was divided up between commercial and industrial banks, industrial loan companies and credit unions.⁵ The small loan companies reported a total of \$1,271,000,000 in cash loans during the year 1946, out of a total of \$3,841,000,000 made by the whole group, standing second to the commercial banks, many of whose loans, however, exceeded the \$300 limit set by the law for small loans.

It is evident from the value of the business done that the Uniform Law enjoys a wider coverage of the lending of small loans to individual borrowers. Relating the effective coverage to population figures from the 1940 census, some 85 per cent. of the urban population of the United States, dwell under the protection of these laws. As it is the city dweller, for the most part, who seeks to borrow, this protection seems all the more comprehensive. Less than eleven million city dwellers live in areas where the laws are non-existent or only partially effective.⁶

This type of lending goes mostly to the American family.

⁴ The figure includes only direct loans to consumers, *i.e.*, personal instalment loans and loans made directly to the consumer for the purchase of automobiles and other merchandise.

⁵ See Consumer Instalment Loans, Fed. Reserve Bd. Bulletin G 17.1, January 1947.

⁶ See Pollak Foundation pamphlet, No. 37, *supra*.

Studies by Neifeld⁷ and others indicate the persistent conclusion that some nine-tenths of all borrowers are family persons who seek credit to meet family needs. A large proportion of the loans sought, as might be expected in the present inflated state of installment selling of household goods, is for the purpose of consolidating numerous debts for furniture, clothing and durable goods. The heaviest per cent., however, is sought to meet emergency expenses such as illness, lying-in and death, the purchase of needed clothing and household appliances.

In seeking such credit the family borrower is by definition in no position to bargain. Whatever the lender demands for the loan, that would he have to pay if he is to secure the money. It is this factor that has given the 'loan shark' his unobstructed opportunity. He has persisted through ages of time because he has met a family need that could be met by no other means save charity.

EXTENT OF THE BORROWER'S NEED

Studies in the field of family income and the cost of living in the United States reveal a high degree of poverty among city dwelling families. Nominal wages reveal little in terms of real income values. During war years wages are abnormally high and employment steady: but war conditions due to excessive government spending create only a temporary jump in the curve of real income, which soon falls back to the usual level of mere subsistence for nearly half the labour force.

Examination for the last available data on income and the cost of living reveal the fact that increases in the average income have been constantly outstripped by increases in the cost of living. For those whose wage is their sole support the net result is that they earn more dollars that will buy less.⁸ In ordinary peace times something more than two-thirds of all American families have incomes below \$2,500 a year.⁹ During the period of heavy governmental war spending the nominal income of these families rose markedly, but the purchasing power of the dollar sank in corresponding degree. The United States Federal Reserve Board, in a sampling study, found that by the end of 1945 the top 10 per cent. of all our spending units (mostly families) held 60 per cent. of all liquid assets. The fourth tenth had 6 per cent. and the fifth tenth had 4 per cent.: while the bottom 50 per cent. had 3 per cent. It is these latter groups who constitute the large majority of small loan borrowers.

In terms of *actual savings* the top tenth still held their 60 per

⁷ Neifeld, M. R., *The Personal Finance Business*, N.Y., Harper & Bros., 1933.

⁸ During 1946 the average weekly earnings of production workers jumped 14 per cent. During the same period consumer prices jumped 18 per cent. If all a man's income must go for family support, these figures make him actually poorer. See U.S. Dept. Labor, *Monthly Labor Review*, Feb. 1947.

⁹ Leven, M., Moulton, H. G., and Warburton, C., *America's Capacity to Consume*, Washington, D.C., 1934, The Brookings Institution, pp. 50 ff.

cent., while the 4th tenth held 9 per cent.; the 5th tenth held 6 per cent.; and the bottom 50 per cent. had no net savings but on the contrary had spent 11 per cent. in excess of the total of all savings.

This item of savings is to be distinguished sharply from money income. This bottom 50 per cent. received in money income 22 per cent. of the whole, notwithstanding they have overspent by 11 per cent.

It has already been stated that most borrowers are persons supporting families, and that they borrow, for the most part, for family purposes. It is to be shown further that most borrowers fall below the \$2,500 mark in annual family income.¹⁰

And while the average borrower is identified as a family man with an income near the \$2,000 mark, the standard of living on a minimum basis of health and decency is placed at that same figure.¹¹

THE BORROWER IS IN NO POSITION TO BARGAIN FOR THE LOAN

It must be obvious from the financial condition of most borrowing families that the man in need of credit has little or nothing upon which he can trade when facing a small loans lender. His wife is at the lying-in hospital, and medical and hospital bills are to be met. Or there is a death in the family and heavy costs are to be incurred. He himself may be ill in bed and may have to stay there for weeks, during which time he may expect scant income or none at all. He may and usually does owe on the furniture, which the vendor threatens to repossess. These and many other contingencies drive him to the money lender.

Because he must have credit or else seek charity he is resigned to paying whatever the lender demands. The usurer asks from 240 to 1000 per cent. for his money, even though the law forbids more than 6 per cent.¹² It is a secret transaction. Many surveys show how severe are the exactions of the illegal lender. Professor William H. Simpson of Duke University, in a survey of lending rates in the Carolinas, found prevailing charges for small sums ranging from 278 to 598 per cent. Frequently the borrower, after paying interest many times the amount of the original debt, found himself still indebted for the original loan and much additional in charges and interest.¹³

The borrower, being unable to bargain, must pay whatever the lender asks, or in the alternative, seek charitable assistance. As

¹⁰ Young, Ralph A., and Associates, *Personal Finance Companies and their Credit Practices*, N.Y., 1940, National Bureau of Economic Research, p. 52.

¹¹ Leven, Moulton and Warburton, *supra*, p. 101. See also *Food for Income Levels*, Univ. of Calif. Press, Berkeley, California, 1946. The Heller Committee.

¹² Hardy, Charles, O., *Consumer Credit and its Uses*, N.Y. Prentice-Hall, Inc., 1938, p. 74.

¹³ Simpson, Wm. H., *The Small Loan Problem of the Carolinas*, Clinton, S.C., 1944, Presbyterian College Press, pp. 21-28.

between the two, he prefers to pay interest, even the most exorbitant.

CONSUMER BORROWING HAS BECOME RESPECTABLE

The coming of regulatory law has undoubtedly been a factor in a change in public regard for consumer borrowing. The old, secret 'loan shark' transaction is disappearing: in its place has come a business loan, recognised by statute and regulated after the manner of any other legitimate business. Instead of an obscure room up a back stairway, the loan agency office is now set up with a glass front like a bank or any other commercial house. Loans are advertised openly on street-car cards and the press as freely as merchandise. Many other causes have helped to bring about the change, such as automobile sales and instalment contracts on other durable goods; but the legitimising of the small loan business has led the way.

And because a new field of legitimate lending has come into being, commercial banks have begun to develop personal loan departments. These are not subject to small loan regulation as yet under American law. They continue to be subject only to the regular banking laws. They may lend in sums exceeding \$300. It remains to be seen how long this condition will continue and how extensively the commercial banks will absorb the small loan business before the small loan provisions will be made operative to cover all such small loans.

Another important loophole in the effectiveness of such regulation, from the point of view of family protection, is the vast and increasing volume of conditional or instalment sales of merchandise, especially household furniture and other durable goods.

This is the day of expensive mechanical gadgets. There is at present an average of one automobile per family in the United States. A large proportion of these vehicles are purchased on credit. Other goods, such as refrigerators, washing-machines, deep-freeze units, sweepers, suites of furniture and the like are purchased largely on instalment. Some slight attempt has been made to protect the purchaser in such transactions by regulation, but nothing substantial has as yet been accomplished.¹⁴

By way of summary it may be stated that American experience offers a valuable contribution to the problem of family protection. The usurer has been a menace through the ages; but by recognising the fact that he has been meeting a basic family need, however badly, and by restraining his greed, a better degree of justice has been obtained for the borrower. Long experimentation has renovated and perfected the method of regulation until now a true substitute for the old-time lender has come into being. He is a business man rendering service to the family in need of credit, and taking a legitimate business profit for this service.

¹⁴ Indiana attempted the first regulatory statute.

In an era of intensive industry, where practically every person needing and seeking consumer loans works for a wage or a salary, the pay slip takes the place of the bounty of the brown earth. Families are completely dependent upon the ups and downs of industry. The job is their sole reliance.

Under these circumstances credit looms as one of the great safeguards of family solidarity. All the more reason, then, why it should be safeguarded against unfair advantage. That body of law which stands at the shoulder of the family borrower, demanding fairness in all dealings, is a primary bulwark of family security.

ROBERT W. KELSO.¹⁵

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WHAT IS A DOCUMENT ?

LAWYERS have had much difficulty in classifying the different forms of communication for legal purposes. One instance of this difficulty is in the distinction drawn between libel and slander. Both libel and slander consist of symbols conveying a defamatory meaning; and the symbols need not be verbal but may be 'pictorial'. Thus a caricature is capable of being libel and a gesture is capable of being slander. The distinction between libel and slander is supposed to reside in the permanence or otherwise of the symbol; but as permanence is a matter of degree the line is hard to draw in marginal cases. Another difficulty is that a 'permanent' symbol may be capable only of 'transient' interpretation. An example is the gramophone record (assuming for the purpose of argument that this is not capable of interpretation otherwise than by being played). If we say that a gramophone record of a defamatory statement is capable of being libel because the words are produced from a permanent base, what are we to make of the parrot trained to utter a defamatory remark? Such a parrot has in its mind an 'engram' corresponding to the defamatory remark, and may be regarded as nothing more than a living gramophone. If the parrot is a libel, what of a small child who has been trained to repeat a defamatory remark? And if this is libel, why should not a repetition of a slander by anyone amount to the publishing of a libel? The problem can perhaps be attacked by saying that the engram in someone's mind is not a symbol, because not directly perceived. But this solution has difficulties of its own.

Since the invention of broadcasting the most sensible way of dealing with this particular distinction would be to abolish it. But there are other departments of the law where the classification of the forms of symbolism occasions difficulty. One such difficulty arises from the rule that forgery can be committed only in respect of a 'document'. Forgery as a common law offence was developed in the eighteenth century, and it was then assumed to be capable of being committed only in respect of a writing. Later the term 'document' tended to take the place of 'writing', and the former term was that selected for use in section 4 of the Forgery Act, 1913, which puts the offence on a statutory footing. The restriction implied by the word 'document' may be illustrated by taking a clear case of something that is not a document. If X makes imitation pearls and sells them as genuine we should not say that he has committed a forgery. So interpreted, the rule that forgery is confined to documents would probably commend itself to the man in the street as a statement of the ordinary meaning of the word 'forgery'.

What, then, is a document? This question has recently been discussed in an important article by Mr. J. W. C. Turner,¹ and the following observations are offered partly as a supplement to his article and partly in order to suggest certain alternative interpretations of the authorities. We shall begin by examining the word 'document' in ordinary speech, and then consider the effect of the case-law.

The typical example of a document is a deed. A deed nowadays consists of certain words written on paper and executed as a deed. Since a document need not be under seal, execution should not be introduced into the definition of 'document'. But some sort of permanent base is essential, for spoken words would not be a document. At first glance it might be tempting to say that this permanent base must be paper. But a little reflection will show that the precise nature of the base does not matter, so long as it be some material object. The Babylonians wrote on clay tablets. There is a legend that Somerset House possesses a stable door upon which a groom chalked a will, and a will has been written on an egg-shell (*Re Banes*, 96 L. J. P. 26). For the purpose of the law of forgery there is no reason for denying that such things are documents.

A document, then, is at its narrowest a verbal symbol (or series of verbal symbols) written, typewritten, printed or otherwise produced on some material base. (A numeral is, of course, a verbal symbol.) Perhaps a recording of the voice, such as a dictaphone record, is also a document, though here the verbal symbol is perceived through the ear and not through the eye. Further, is it necessary to confine the word 'document' to verbal symbols? What about pictorial symbols? A plan, map or engineer's drawing may be described as a pictorial or non-verbal symbol. Such things certainly raise words in the mind, but unlike verbal symbols they do not compel the interpreter to think words in a set order. Now most laymen would say without hesitation that plans, maps and drawings are capable of being forged, notwithstanding that the symbolism is non-verbal. Nor is it a strain upon language to say that they are documents. Can we go a step further and include a painting? The layman (who regards forgery as synonymous with what is colloquially called 'faking') would probably say that a painting can be forged: but he would probably also say that a painting is not a document. What is the reason for this feeling that a plan is a document but a painting is not? Perhaps it is because a plan usually purports to state a fact or guide future conduct, while a painting may be purely imaginative. But on this distinction a photograph should be a document—even a photograph of a painting. Also, a painting may be 'photographic' and should then be a document.

¹ 'Documents in the Law of Forgery' (1946), 32 Va.L.Rev. 939. I am indebted to Mr. Turner for reading this article and making some valuable comments.

It may be said that paintings and photographs do not enter into the discussion because, unlike plans and maps, they are not symbols. Whether they are symbols is a verbal question: but at any rate they bear a close resemblance to accepted symbols. For instance, if a plan of a town is a symbol it is but a short step to say that an aerial photograph is a symbol; as is well known, aerial photographs frequently need much more skill in their interpretation than the reading of plans and maps. There is, however, a difference, in that a plan is consciously devised to 'stand for' something else, and is therefore a symbol, whereas an aerial photograph is a mechanical recording of light rays as they happened to fall upon the lens, and, although capable of being interpreted as a 'sign' of the thing photographed, may be said not to be a symbol for that thing.² If the latter proposition is accepted for aerial photographs it must be accepted for all photographs. On the other hand, it may be argued that the camera lens is consciously made in such a way that it produces a result that reminds us as vividly as possible of reality as perceived by the human eye, and therefore that the photograph is a consciously-devised symbol. A drawn or painted portrait, particularly if it is caricatured, is not open to the same doubts as the photograph: it is more clearly a symbol.

It would, of course, be possible to define the word 'symbol' in such a way as to exclude photographs and paintings. Thus it may be said that writings, plans and maps, which are symbols, do not give a visual illusion of reality; photographs and paintings do, and are therefore not symbols. But this idea of pictures giving an illusion of reality will not stand up to much examination. It is only very partially true to say that an impressionistic painting gives an illusion of reality. Even a detailed photograph creates an illusion only for a person who deliberately, as an intellectual feat, loses himself in the scene. A dog is not interested in a picture of his master, because he knows it is not his master; to him it is only a piece of paper or canvas; he is not interested in what may well be called the symbolism. He could be made to take an interest only if, by suitable light effects, he could be made to think that the picture was his master. Even then his attitude towards the picture would be different from that of a human being who realises the artifice employed. The human being can allow himself to be reminded of reality by a picture without being deluded into thinking that it is reality.³

² The terminology is that of Ogden and Richards, *The Meaning of Meaning* (6th ed., London, 1944). Examples of signs, given on p. 21, are: a temperature as a sign of influenza; a litmus paper turning red as a sign of the presence of acid; a black cloud as a sign of rain. Symbols are defined at p. 23 as a special class of signs, being 'those signs which men use to communicate one with another and as instruments of thought'; they include 'words, images, gestures, and such representations as drawings or mimetic sounds'.

³ There are other difficulties in distinguishing between symbol and illusion. To listen to the gramophone record of an orchestra may for some people be as good

All this trouble over the word 'document' merely illustrates the difficulty that is experienced with every word in its application to marginal situations. It may be thought that we are setting ourselves an unnecessarily difficult task in attempting to decide the meaning of 'document' in the abstract. Meaning is important only in a context, and at the moment we are attempting to ascertain the meaning of 'document' in relation to the context of forgery. Now there is another rule in forgery that may help us to fix the meaning of 'document'. This is that, to be a forgery, the document must not only tell a lie, but tell a lie about itself. If a thing does not tell a lie about itself it cannot be a forgery, and the question whether it is a document or not then becomes academic for the law of forgery.

'Telling a lie about itself' usually means telling a lie as to the person who made it or authorised its making, as to its contents when made, or as to the date or place where it was made.⁴ Thus if the holder of a cheque adds a '0' to the end of the figures on the cheque he commits forgery, because he makes the document convey a false impression as to its contents when made by the person who purports to be the maker. The lie must be told by the document itself taken in conjunction with the circumstances in which it is used.

Now it may be argued that a thing cannot tell a lie about itself unless it contains verbal symbols. A plan or painting bearing no signature or other words cannot tell a lie about itself; therefore it cannot be a forgery, and the question whether it is a document is immaterial.

The validity of this argument depends on whether, for the purpose of the law of forgery, a thing can be regarded as telling a lie though it uses no words to do so. If 'telling a lie' means conveying a false impression, this would certainly seem to be possible. For instance, suppose that an antiquarian removes an end-paper from an early printed book and writes on the paper a poem in a late sixteenth-century hand resembling Shakespeare's. He then puts it out to the world as a remarkable antiquarian discovery. Most people would say that he had committed forgery. Yet the poem in itself tells no lie; the lie is told by the parchment and the style of handwriting.⁵ Again, it has been held in America to be a forgery to cut an unauthorised notch on a tally⁶; yet the

as listening to the orchestra itself: is the record then a symbol of the orchestra, or an illusion of the orchestra, or something to be enjoyed in itself apart from symbol and illusion?

⁴ See Forgery Act, 1913, s. 1 (2); but cp. Criminal Justice Act, 1925, s. 35 (1), which indicates that the definition may not be exhaustive.

⁵ The antiquarian's false representations do not in themselves make it a forgery: *R. v. Jones* (1779), 1 Doug. 300.

⁶ *Rowland v. Burton* (1837), 2 Harr. (Del.) 288; *Kendall v. Field* (1836), 14 Me. 30 (quoted by Turner, *op. cit.* 951). This illustration may be thought not to be so strong as the preceding one, because the notch may be regarded as (for those who can interpret it) a verbal symbol.

piece of wood tells no lie to a person who does not know the circumstances in which it is used.

If this is so, it follows that a fraudulent copy of a painting or plan may in some circumstances convey a lie about its own authorship as clearly as if the authorship were stated upon it in so many words. Hence the question whether such a painting or plan is a 'document' remains important.

We now turn to the authorities. The case prompting the foregoing observations is that of *R. v. Closs* (1857).⁷ The prisoner, a picture-dealer, had been convicted on the third count of an indictment which charged him with uttering a forgery, namely, a copy of a painting by John Linnell, on which John Linnell's name was forged with intent to denote that the copy was an original painting by him. Before the Court for Crown Cases Reserved, counsel for the prisoner assumed in his argument that there could be no forgery of a picture, and devoted his energies to showing that the copying of the signature made no difference. He ingeniously compared the case to one of stamping the name 'Manton' on a gun. A gun without a name would not be a document, and the addition of the name could not turn it into one. Two judges interposed to agree with this argument, saying that that would be the imitation of a trade mark, not of a name or signature. Thus fortified, counsel went on to argue that 'the name put by a painter in the corner of a picture is not his signature. It is only a mark to show that the picture was painted by him. Any arbitrary sign or figure might be used for the same purpose instead of the name; it is a part of the painting, and every faithful copy would contain it'. In reply, counsel for the Crown contended that the painting of the artist's name was in the nature of a certificate, and that forgery had therefore been committed. Cockburn, C.J., interposed to ask: 'If you go beyond writing, where are you to stop? Can sculpture be the subject of forgery?'

In the result the court held that there was no forgery. The judgment on this point is very short. 'A forgery must be of some document or writing: and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his.'

This reasoning involves two propositions: (1) a picture is not a document, and (2) the addition of the painter's name makes no difference. We shall examine each of these propositions in turn.

As to (1), the legal rule stated is that a forgery must be of some document 'or' writing. Apparently the 'or' is conjunctive, so that 'document' is a synonym for 'writing'.⁸ This seems to

⁷ Dears & Bell 460; 27 L.J.M.C. 54; 30 L.T. (o.s.) 235; 3 Jur. (N.S.) 1309; 6 W.R. 109; 7 Cox 494.

⁸ Mr. Turner (*op. cit.* 947) notes that the earlier authorities use the word 'writing' rather than 'document'.

rule out not only the painting but the plan, map and photograph. A writing may perhaps be defined as a number of symbols in semi-permanent form (query, visible form?) and intended to evoke in the mind a series of words in set order. A plan or photograph may evoke words in the mind, but not necessarily in an order contemplated by the author, and so is not a writing. The line is an arbitrary one, but as we have seen almost any line will be arbitrary, and this line is perhaps as good as any other. If this line is accepted the main outstanding question is as to the recording of the voice, which resembles a writing in that verbal symbols are used, but differs from it in that it appeals to the ear, not to the eye.

As to (2), the reasoning is not very convincing. Most people would say that the artist's signature is meant to convey an assurance that he has painted the picture. The court seems to deny this, at any rate in words, for it says that the name 'was no more than if the painter had put any other arbitrary mark as a recognition of the picture being his'. The argument here seems to be in two stages. (a) If the painter had put, say, a rose in the corner of the painting to indicate to others⁹ that it was his work (after the manner of a mason's, goldsmith's or silversmith's mark), that would not be a writing. (b) The signature was no more than such an arbitrary mark. To this argument the following replies may be made.

(a) If a rose in the corner of the picture was intended and understood to mean 'I, John Linnell, have painted this', then surely it would be a writing. It cannot be supposed that to be capable of forgery a document must be in ordinary Roman letters. It may presumably be written in ideographs (as in ancient Egyptian and Chinese), or in a phonetic shorthand, or in a secret code. All that is required is that it should consist of written symbols. The picture of a rose, on the present supposition, would be a written, verbal symbol.

(b) Even if the foregoing argument is incorrect, the fact was that the man who copied the picture did not paint a rose on it; he painted the words 'John Linnell'. It is not a satisfactory way of deciding a case to say that if the facts had been different it would not have been forgery, therefore on the actual facts it was not forgery. Such an argument is valid only if the change of facts is immaterial; but if the legal decision is made to turn on the presence or absence of conventional writing, it is not an immaterial change to suppose that the picture contained no conventional writing when

⁹ Mr. Turner (*op. cit.* 949) interprets the judgment differently; he thinks that 'it merely states the view that a painter's signature is intended *not* to declare that the picture was the work of his hand but is merely put there so that the painter himself shall be able to identify the picture'. But, with respect, it seems that the word 'recognition' in the judgment refers to recognition (identification) by other people, not by the painter; and this is borne out by the argument of counsel for the defence, which the court evidently intended to adopt. Mr. Turner himself shows the absurdity that would attach to his own interpretation of the judgment.

in fact it did. The question was whether the writing made an assertion that was untrue, and whether the untruth was a lie about the writing itself. Now the painting of a name on a picture is generally understood as an assertion that the painting was the work of the man known by that name. It would seem to follow that the copying of the name (with the requisite intent to deceive or defraud) should be forgery. Similarly the copying of a name on a statue or a gun, if the name would be understood to make the same assertion as in the case of the painting, should be forgery. This, however, seems to be not now the law; and apparently we have to say that as a result of the decision in *R. v. Closs* a name inscribed on a thing that is not itself a document does not turn it into a document.

In one respect the decision in *R. v. Closs* accords with 'common sense'. If it is not forgery fraudulently to copy a well-known old master that happens to have no name at the bottom, it would be contrary to common sense to hold it forgery to copy an old master that has such a name. For in each case it is the faithfulness to the original that creates the deception, not the mere name. Similarly, if it is not forgery to copy the style of a Ford car without using the name 'Ford', it would be contrary to common sense to hold it forgery to inscribe the word 'Ford' on the radiator.

Suppose for the sake of argument that the contrary were held, and that the writing of the name 'Ford' on an imitation of a Ford car were held to be forgery. Then the way would be open to an argument that the imitation of a Ford car without the name 'Ford' on it would be forgery. If a person who is familiar with the appearance of Ford cars sees a car looking like a Ford, though without the name 'Ford', he will probably think to himself 'That is a Ford car'. The whole appearance of the car is a message to him, and if for the purpose of the law of forgery a message can be communicated otherwise than in writing, then the imitation of the car is forgery. This leads us to the further argument that imitating a string of pearls would be forgery. It is clear that we have to stop our descent somewhere down this slippery slope, and it will be generally agreed that we have to stop above the Ford car (whether it carries a name or not). Motor cars have been called by several names, but it is doubtful whether anyone has yet referred to them as documents.

Yet put a slightly different case. A personates B in an examination in drawing. If the drawing sent in contains no name or number we must say that it is not a forgery because it is not a writing. But if B's name or number is written on the front of the drawing, common sense would say that it is a forgery.¹⁰ Does the decision in *R. v. Closs* preclude this view of the law?

¹⁰ The question is not an academic one notwithstanding the False Personation Act, 1874, for that Act applies only where the personation is for the purpose of obtaining property—as where it is a scholarship examination.

The reader may think that in the discussion so far we have raised an excessive number of problems without resolving them. It is suggested that no completely satisfactory solution is possible, and that in default of a better solution the matter should be regarded as settled by the authority of *Closs*. *Closs* is in any case a decision of the Court for Crown Cases Reserved, which could probably be upset only by the House of Lords. The result of *Closs*, it is submitted, is twofold. (1) Every 'document' is a writing, so that a painting, photograph, plan, map or drawing¹¹ is not a document, unless, of course, it contains sufficient writing to make it a document. A photostatic copy of a writing would be a document, and so, presumably, would a pictorial photograph attached to and referred to in what is otherwise a document. Thus tampering with a photograph on a passport would be capable of being a forgery, even if passports were not specifically provided for by statute.¹² (2) If a thing is not otherwise a document, the addition of a name cannot make it one. This applies to the artist's name on a painting, the manufacturer's name on a gun or car, the maker's mark on gold or silver plate,¹³ and, it seems, the candidate's name on a drawing submitted for an examination.

Another decision on the general question is that in *R. v. Smith* (1858).¹⁴ The prisoner sold baking powder in wrappers identical with those used for Borwick's baking powder, except that the signature of Borwick, and the notification that without such signature no powder was genuine, were omitted. Apart from this the wrappers used by the prisoner contained a considerable number of printed words following Borwick's wrappers, the object of which was to extol the contents, and the wrappers also contained the word 'Borwick's'. It was held by the Court for Crown Cases Reserved that this was not forgery. Pollock, C.B., said that he doubted whether the wrappers were 'anything like a document or instrument which is the subject of forgery at common law. . . . It might as well be said that if one tradesman used brown paper for his wrappers, and another tradesman had his brown paper wrappers

¹¹ *Contra*, Turner, *op. cit.*, 953, who suggests that an engineer's drawing or surveyor's plan would be a document, because they are 'a substitute for words'. But why should an engineer's drawing be a substitute for words, any more than a verbal description of machinery is a substitute for an engineer's drawing? If an engineer's drawing is a substitute for words, why should not a photograph of machinery be a substitute for a verbal description of it; and if a photograph of machinery is admitted, why not a painting of machinery? This line of reasoning would result in a distinction between a painting as a statement of fact and a painting as an expression of the artistic imagination, and presumably between a writing as a statement of fact and a writing as an expression of the artistic imagination. Yet Mr. Turner expressly rejects (*op. cit.* at 952) the distinction between writings relating to facts and writings of fiction.

¹² Criminal Justice Act, 1925, s. 36.

¹³ But these are provided for by the Act of 1913, s. 5 (4) (b).

¹⁴ Dears & Bell 566; 27 L.J.M.C. 225; 31 L.T. (o.s.) 135; 22 J.P. 274; 4 Jur. (n.s.) 1003; 6 W.R. 495; 8 Cox 32.

made in the same way, he could be accused of forging the brown paper'. This ignores the fact that there would be no words on the brown paper, whereas there were words on the wrappers before the court; but apparently the mere presence of words is not decisive.

Another purported reason given by Pollock, C.B., and Willes, J., was that if the wrappers were forgeries then the mere printing of them by the prisoner was the offence of forgery, whereas here the offence consisted in putting the spurious powder inside the wrappers and selling it. On this it is to be observed that on its face it is not a reason at all, for it begs the question. Willes, J., went on to justify his previous proposition by saying that 'if the prisoner had had 100 genuine wrappers and 100 not genuine, and had put genuine powder into the spurious wrappers and spurious powder into the genuine wrappers he would not have been guilty of forgery'. This is another attempt to solve the problem by reference to facts not present in the case. Both parts of the dictum are probably true, but are distinguishable from the case in hand. As to the second part, it is true that putting spurious powders into genuine wrappers would not be forgery, because the wrappers would not tell a lie about themselves; but in *Smith* the wrappers did tell a lie about themselves, namely, as to the firm that produced them. Then as to the first part of the dictum, it is probably true that it would not have been forgery if the powder had been genuine, for then there would probably have been no intent to defraud, but only to deceive. But in *Smith* there was an intent to defraud.

Perhaps what Willes, J., meant was that in *Smith* the purchaser was prejudiced not by the spurious wrapper but by the spurious contents. If the purchaser had obtained genuine contents he would not have cared about the spurious wrapper, and, conversely, if he had obtained spurious contents he would not have been mollified by the fact that they were contained in a genuine wrapper. But in answer to this it may be pointed out that in *Smith* both the wrapper and the contents were spurious: the spurious wrapper helped to deceive the purchaser as to the spurious contents, and did therefore prejudice him. Suppose that a thief forges a testimonial to his own honesty, and by its means obtains employment as a bank clerk. It could hardly be argued, as a defence to a charge of forgery, that the bank was prejudiced not by the spurious testimonial as to the thief's honesty but by the fact that he was a thief. But for the forged testimonial the thief would not have obtained the situation and with it the opportunity of robbing the bank. Similarly, in *Smith*, but for the spurious wrappers, the prisoner would not have been able to sell his spurious product.

A third argument, advanced by Bramwell, B., was that 'forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts

what the other does—the one is as true as the other, but one gets improperly used'. It may be admitted that as a wrapper the prisoner's production was as good as Borwick's. But it seems to be an unusual use of language to say that it was as 'true' as Borwick's. Most people would take a label bearing the words 'Borwick's Baking Powder' as asserting that the label itself (as well as the contents of the package) emanated from the house of Borwick. They would understand from the label that the whole article was a Borwick's product, without distinguishing for this purpose between the label and the contents. This understanding would be true in the case of the genuine label, false in the case of the prisoner's.

Despite its indifferent reasoning, we must assume that *Smith* decides something, and the best ground seems to be that a 'document' in the law of forgery means an instrument (the 'or' in *Pollock, C.B.*'s judgment being conjunctive). Just as *Closs* decides that a document is a kind of writing, so *Smith* decides that it is a kind of instrument. The wrappers in *Smith* were not forgeries because, although literally writings, they were not instruments. So also a novel, or a candidate's script in an examination, though they consists of written words, are not documents for the purpose of the law of forgery because they are not instruments. Further, applying the second part of the rule in *Closs*, they do not become documents even though the novel contains the name of the author and publishers on the title-page, and the candidate's script bears a name on the cover.¹⁵ To publish a novel without authority is a breach of copyright and an offence under the Copyright Act; to send in a script in the name of another candidate may in certain circumstances be false personation; but neither is forgery.

It is easy to give examples of writings that are not instruments, not so easy to define 'instrument' in the abstract. Clearly the word would include any writings containing or evidencing a bilateral transaction or unilateral act in the law, such as a will. The meaning of the word has been somewhat clarified by decisions on section 7 of the Forgery Act, which provides a special punishment for demanding property on forged instruments (the Act uses this time the word 'instrument' instead of the word 'document', which appears in other sections). It has been held that 'instrument' for this purpose includes any written offer or acceptance,¹⁶ and, indeed, any 'writing which, if accepted and acted upon, would establish a business relation and lead directly to business dealings with another person',¹⁷ such as a servant's letter to his master requesting money for the

¹⁵ *Contra*, *Turner, op. cit.* 951, 953.

¹⁶ *R. v. Riley*, [1896] 1 Q.B. 309; *R. v. Howse* (1912), 23 Cox 135 (both decided on a similar provision in earlier legislation).

¹⁷ *Per Willes, J., in Riley*. It is submitted that *R. v. Burke* (1822), Russ. & Ry. 496, would not now be followed.

purpose of spending it on the master's property.¹⁸ It is submitted that, as so interpreted, 'instrument' in section 7 is synonymous with 'document' in the rest of the Act. A document for the purpose of forgery has been held to include even a clergyman's testimonial,¹⁹ which was not an act in the law at all but merely a document that could be used to induce a contract of employment. Cannot it be said that in *Smith* the printed wrapper containing merchandise was also a document used to induce a contract? There is a difficulty here, but it can perhaps be resolved by a test about to be suggested.

Reviewing the various problems that have been posed in this paper, one test of a 'document' or 'instrument' that may be suggested is whether the thing is intended to have utility apart from the fact that it conveys information or records a promise. Guns and cars are not documents or instruments because they are intended to have non-symbolic utility; and it would make no difference that the individual gun or car happens to be useless. A printed wrapper plainly has non-symbolic utility as the equivalent of brown paper, and it is accordingly distinguishable from a testimonial which is not intended to have such utility. So, also, a painting or a novel may be said to be intended to have an æsthetic effect (whether or not it achieves that effect), and thus is not a document. On the other hand, the examination script, and even the entry in the examination in drawing, are intended merely to give information as to the ability of the candidate, and so, on this view, are documents. Yet it seems doubtful whether they could be said to be 'instruments' within the ordinary meaning of that term. Again, a plan or engineer's drawing would on this test be a document; yet it is not a writing, and may be held not to be an instrument. Thus it may be that the 'utility' test just suggested is not exhaustive. If a thing is intended to have non-symbolic utility it is not a document or instrument: but it does not become a document or instrument merely because it is intended to have purely symbolic utility.²⁰

Closs and *Smith* were concerned with the offence of forgery at common law. It was evidently the intention of the draftsman of section 4 of the Forgery Act to put this offence into statutory form. As we have seen, three words were open to him to describe the thing of which forgery can be committed: 'document', 'writing' and 'instrument'. He chose the word 'document', and did not define

¹⁸ *R. v. Cade*, [1914] 2 K.B. 209.

¹⁹ *R. v. Sharman* (1854), Dears. 285. Cp. *R. v. Toshack* (1849), 1 Den. 492, where the testimonial was used to induce the grant of a master's certificate.

²⁰ The test also gives rise to some difficulty where writing that would normally be committed to paper happens to be inscribed upon a base that has other utility—as in the case of the legendary stable-door in Somerset House, or the cow upon which a cheque was written in one of Sir Alan Herbert's *Misleading Cases*. Apparently such things, if they occur in real life, may be accounted documents.

it. It is submitted that it must be taken in its common-law sense, and means that kind of document which is a writing, and that kind of writing which is an instrument. The common-law rules continue to apply.

If this is so, it must be regarded as a question still outstanding whether printed designs, such as postage and national health insurance stamps, bank notes and ration cards, are capable of forgery under section 4. Designs such as those instanced contain a certain amount of writing, but they are commonly recognised not by the fact that they contain these words, but by the fact that they are of a standard design. A postage stamp contains words like 'Postage Revenue 1d.', but if the Post Office issued red stamps bearing the engraving of the King's head but no words it would be immediately accepted as a postage stamp.²¹ A pound note contains on its face a promise signed by the Cashier of the Bank of England to pay the bearer on demand the sum of £1; but since there is no material thing corresponding to the words 'pound sterling' except the pound note itself, there is nothing that the Bank would in fact pay in return for a £1 note (except, as a matter of grace and not of right, another £1 note or small change). The words are fictitious; what matters is that the note follows the standard design. In most cases the question whether these designs are covered by section 4 is academic, since they are covered by other sections of the Forgery Act, or other special statutes. But it is possible to imagine papers falling outside these special statutory provisions, when the question under section 4 would be important. In *R. v. Smith*, when counsel tried to argue that the printed wrappers were documents upon the analogy of bank notes, Willes, J., interposed: 'The forgery of bank notes is provided for by statute'²²—as if to say that they would not be documents for the purpose of the common-law offence (which is now contained in section 4). The dictum is particularly striking, because in 1858 the bank note could have been regarded as a contractual promise—namely, to pay golden sovereigns—and so could have been regarded as an instrument. During the present emergency the fraudulent imitation of food 'ration documents' is expressly made an offence by statutory order²³; but it seems still to be open to argument that other ration papers are outside the protection of the criminal law.²⁴

²¹ Kenny, *Outlines of Criminal Law* (15th ed., 298), states that stamps were protected at common law, but quotes no authority.

²² *Dears. & Bell* at 573.

²³ S.R. & O., 1946, No. 1099, Art. 27 (e); cp. definition in Art. 1 (1).

²⁴ The Forgery Act, 1913, s. 3 (3) (f), covers documents issued by an officer of state and the Defence (General) Regulations, 1939, Art. 82 (1) (a), covers documents issued for the purpose of the Regulations; but neither enactment defines the word 'document'.

This somewhat inconclusive discussion has not revealed a very happy clarity in the law, and it is greatly to be hoped that when one day we enact a Criminal Code the scope of forgery will be better defined.²⁵

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²⁵ The above discussion of the words 'document' and 'instrument' has been confined to their use in the law of forgery. For judicial definitions in other branches of the law see Burrows' *Words and Phrases*, s.v., and Phipson, *Evidence* (8th ed., 524).

MODERN SOVIET DIVORCE PRACTICE

THE text of the recent Decree together with a Commentary on its application in practice by G. M. SVERDLOV, from an article in *Sovietskoye Gosudarstvo i Pravo*, 1946, No. 7, p. 22, translated by Dudley Collard for the Anglo-Soviet Law Association.

FOREWORD

The Decree of the Presidium of the Supreme Soviet of the U.S.S.R. of July 8, 1944, is inspired by the desire to encourage large families and to uphold the institution of marriage. The first four of its five parts are not directly concerned with divorce; but to illustrate the context in which the Soviet Union drastically amended its divorce law, here is a summary of these parts.

The preamble says: 'Care for mother and child and support of the institution of the family have always been among the most important duties of the Soviet State. The State protects mother and child by granting substantial financial aid to expectant mothers and for the maintenance and education of children. In consequence of the war, many families face greater financial difficulties, and a further extension of these measures is necessary . . .'

Part I (sections 1-5) increases State grants to mothers of large families; and provides for State maintenance of the children of unmarried mothers until the age of twelve, whether or not the mother subsequently marries.

Part II (sections 6-11) extends the privileges accorded to expectant and nursing mothers. Leave of absence on full pay before birth is now five weeks and after birth six weeks, or eight weeks in the case of twins, or a difficult birth. Additional food rations and restrictions on night work and overtime during pregnancy and nursing are provided for.

Part III (sections 12-15) institutes medals and orders for motherhood.

Part IV (sections 16-18) imposes a tax on bachelors and a lesser tax on those who have only one or two children.

Here is Part V verbatim:

'19. A registered marriage alone shall give rise to the rights and obligations of husband and wife as laid down by law. Persons having *de facto* marital relations prior to the promulgation of this Decree may formalise the same by registering their cohabitation, stating the period thereof.'

Previously the rule had been that any permanent cohabitation whether registered or not created the legal relationship of husband and wife.

'20. Affiliation proceedings are abolished. A mother may not claim maintenance for a child from a father to whom she is not married by registration.'

Hitherto, affiliation orders were made much as in England, save that where there were several putative fathers all were obliged to contribute. Henceforward, the State undertakes in all cases to provide the necessary maintenance (Part I) and the mother is spared the worry and expense of establishing paternity in judicial proceedings.

'21. The child of an unmarried mother shall be given the surname of its mother upon registration of its birth, and the mother may select its patronymic.'

Unlike our own rather casual attitude to the matter, the Soviet Union attaches considerable importance to the question of appropriate surnames. This is further illustrated in Mr. Sverdlov's commentary below. The Russian custom of bestowing a patronymic upon children gives the unmarried mother an interesting opportunity of recording the identity of the father.

'22. A registered marriage shall be entered in identity cards, stating the full name and date of birth of the spouse and the date and place of the registration of the marriage.

'23. Divorce proceedings shall be heard in open court. The court may, on the application of either party, order a hearing in camera where it considers such a course essential.

'24. The following shall be the procedure for a divorce:

- (a) the petition shall be presented to the people's court, stating the grounds for the divorce, and the full name, year of birth and place of residence of the respondent. A fee of 100 roubles shall be payable on presentation of the petition;
- (b) the respondent shall be summoned to appear before the people's court, who shall acquaint him with the grounds for the petition, and conduct a preliminary enquiry into such grounds, and direct what witnesses it will be necessary to call;
- (c) notice of divorce proceedings shall be published in the local newspaper at the cost of the petitioner.

'25. The people's court shall determine what grounds exist for the petition and shall take steps to reconcile the parties, for which both parties and, if need be, witnesses shall be peremptorily summoned.

'If a reconciliation does not ensue, the petitioner may apply for a divorce to a superior court. The regional, territorial, district or city court, or the supreme court of a Union or autonomous republic shall have jurisdiction to grant a divorce.

'26. The superior court, on granting a divorce, shall:

- (a) determine which parent shall have the custody of each child of the marriage and which parent shall be liable to maintain the children and the amount of such maintenance;

- (b) direct the division of joint property between the spouses either specifically or on a cash basis;
- (c) grant to each spouse upon application the right to use his or her pre-marital surname.

‘27. In accordance with the judgment of the court the registry office shall issue a certificate of divorce and enter the divorce in the identity cards of both parties and charge to one or both parties a fee of from 500 to 2,000 roubles as directed by the court.’

Section 28 provides for consequential amendments in the legislation of the Republics, and section 29 gives power to make rules.

MR. SVERDLOV'S COMMENTARY

Mr. Sverdlov has selected six subjects for comment in his article: the grounds for divorce, the distinction between divorce and nullity, the right to maintenance, the question of surnames, the fee for divorce, and the effect of the registration of the decree of divorce. The remainder of this article is in Mr. Sverdlov's own words, which were, of course, addressed to Soviet readers.

GROUND'S FOR DIVORCE

The Decree of the Presidium of the Supreme Soviet of the U.S.S.R. of July 8, 1944, introduced substantial changes in the procedure for obtaining a divorce. Instead of the previous procedure, under which a divorce was registered in the registry office on the request of either spouse alone without assigning reasons, the Decree has now introduced a judicial procedure for divorce, under which the grounds for the divorce must be stated, and the court is given a discretion to refuse a divorce.

This discretion of the court is the principal substantive alteration introduced by the Decree. Like the change in the treatment of marriage registration, it is an indication that the Socialist State is striving to reinforce family ties, to ‘combat a frivolous attitude towards family responsibilities’.

This fundamental amendment of the law governs all the procedural innovations introduced by the Decree: the two separate court hearings, the admission of witnesses, publicity, and the increased fee payable.

The Decree has raised some important problems: let us discuss first the grounds for a divorce. In contrast to foreign legislation, the Decree does not define the grounds for divorce. It empowers the court in all cases to consider the reasons put forward in the actual circumstances of each individual case. This considerably enhances the creative role of the judiciary and makes the elaboration of general principles extremely important.

We have recently had the opportunity of studying a number of judgments delivered since the Decree, mainly in the first half of

1945. In all we have seen the records of more than 400 cases decided in the courts of more than eighteen towns.

It would be wrong to expect from these cases a comprehensive picture of the principles which are being formulated by judicial practice. The latter is not yet sufficiently extensive, and no definite policy has yet emerged even on the most elementary questions. Nevertheless there are some points on which a uniformity of practice may already be detected.

We found that in the great majority of divorces (66 per cent.) the initiative is taken either by both spouses together, or by one with the consent of or without any objection by the other. It is significant that in every such case without exception the court granted the petition.

This would seem to indicate that the courts have already decided to regard mutual agreement as a sufficient ground for divorce. The absence of any judgment dismissing a petition where mutual consent existed points to this conclusion, as does also the reasoning of the judgments, which run: 'whereas both parties demand a divorce', 'whereas the respondent does not object to a divorce', etc.

We consider that this attitude fully corresponds to the general tenor and theoretical principles not only of the Decree, but also of Soviet family law as a whole as it has developed since the promulgation of the Decree. It is impossible to grasp the theory of divorce legislation without understanding its organic connection with marriage legislation.

The Decree did not introduce any substantive changes into the marriage law, but by providing that only a registered marriage gives rise to marital rights and obligations, it has made an important change in the requirements of the form of marriage. It left untouched, however, the basic principles which have characterised marriage in Soviet law since the first days of the October revolution.

One of these principles is the freedom of marriage, that marriage is based on free voluntary consent. Section 6 of the Marriage Code of the R.S.F.S.R. provides that the consent of the parties contracting marriage is an essential condition precedent to a valid marriage. Our law rejects that dependence on the consent of other persons (parents, guardians, authorities) which is a feature of bourgeois legislation and pre-revolutionary Russian law. It emphatically rejects the possibility of contracting marriage where the will of one of the parties is subjugated to the will of some other person. In those parts of the Soviet Union where, as a survival of tribal customs, such a phenomenon is still possible, the criminal law is used to suppress it.

From this principle of the inadmissibility of a forced marriage follows the principle of freedom of divorce, which is expressed by the rule that just as marriage is based on voluntary consent, so it may be dissolved by mutual agreement. All that the State requires

is an assurance that mutual agreement exists in fact, and has been arrived at after serious consideration and not frivolously.

The new judicial procedure for the dissolution of marriage serves to achieve this assurance.

Professor I. A. Pokrovsky, in his well-known book 'Basic Problems of Civil Law', criticises the idea that divorce legislation can or should aim at combating frivolity, and claims that it is impracticable to define frivolity by law. We cannot regard this point of view as correct, since it disregards the influence of the law and the State on a person's conscious actions. It is, of course, impossible to devise any absolute guarantee against a frivolous divorce by mutual consent. But the Decree does provide some serious guarantees: the judicial procedure, the publicity, the efforts at reconciliation, the personal appearance of both parties, the reasoned judgment, and the large fee.¹

What the influence of the Decree on divorces has been has not yet been sufficiently analysed, but statistics so far available show a sharp decline in divorces.

If the courts have adopted the practice of invariably granting a divorce where there is mutual consent, how does the present judicial procedure differ from the previous procedure of divorce by registration? The difference is that registration was not a juridical act, which alone can terminate marital rights and duties. Such termination did not automatically follow on the registration of a divorce. Just as the registration of a marriage, before the Decree of 1944, was merely the 'formalising' of a marriage,² so the registration of a divorce was in essence the 'formalising' of a divorce; whether or not a divorce was registered, in certain cases the legal relations of the spouses were deemed to have ended where it was proved to the court that marital relations had ceased *de facto*.³

The Decree of 1944 altered this situation. The judgment of the court, which is now required, affects the civil status of the parties. The registration of a divorce, without a court judgment, does not affect the legal relationship of the parties, whose marital rights and

¹ There are other possible guarantees. The legislation of those foreign States which permit divorce by mutual consent (*e.g.*, Belgium, Mexico by the law of 1917, Norway by the law of 1917, Sweden by the law of 1915, Denmark by the law of 1920, Czechoslovakia by the law of 1919, and some other countries) attaches certain conditions to it. Thus by Belgian law the spouses must be of a sufficiently mature age—the husband not under twenty-five and the wife not under twenty-one; a petition on this ground may not be presented within two years of the marriage; and the spouses must reach agreement about the disposition of the children. When the French Code permitted divorce by mutual consent (until 1816) it imposed the same conditions. By Swedish, Danish and Norwegian law the final decree of divorce by mutual consent is pronounced only after a year's separation, during which efforts at reconciliation are made.

We consider that it would be useful to give our courts a direction to take all these points into consideration without making any of them formally binding rules. It would be specially appropriate to empower courts to adjourn for a fixed period a divorce petition based on mutual consent.

² R.S.F.S.R. Marriage Code, s. 1.

³ *Ibid.*, s. 20, repealed April 16, 1945; *Official Gazette*, 1945, No. 26.

obligations continue to exist. The necessity for a court judgment is intended to be a restraining influence discouraging ill-considered and frivolous divorces. Since the State now attaches such momentous consequences to the judgment, the court is obliged to grant a divorce where there are serious grounds for it.

Where the respondent objects, or does not agree, to a divorce, the court's attitude is different. Freedom of divorce must not lead to licence and abuse; and in these cases the court sometimes refuses a decree.

The refusals are only a small proportion (about 5-6 per cent.) of the total cases. But they are all in cases where the respondent has raised an objection to the divorce, and if one takes such cases alone, about 23 per cent. of them are dismissed. No far-reaching inferences should be drawn from these facts, because the actual number of dismissals is very small. But they do show that the court will refuse a decree only in cases where one party alone is petitioning for it.

An analysis of these refusals gives approximately the following picture:—

(1) The respondent's objection puts the divorce in issue, and the court then considers what grounds may exist for the divorce other than the wishes of the parties.

(2) The court will refuse a divorce in cases where the respondent's conduct cannot be blamed for the failure of the marriage.

(3) The reliance of the petitioner on his own guilty conduct (*e.g.*, in being unfaithful to the respondent) is not a ground for divorce.

(4) All cases of refusal have been where the parties had infant children. Of course, since the court may regard the innocence of the respondent as a ground for refusing a divorce, in theory a petition might be dismissed even where there were no children; but the existence of children, to whom a divorce might be prejudicial, serves as an additional ground.

The respondent's objection to a divorce carries much weight, but is not conclusive. While our law strives to prevent unfounded divorces, it does not say that a divorce is inadmissible when only one party petitions for it.

We have not sufficient material to give a general picture of the grounds on which the court grants a divorce in the absence of the respondent's consent. But in the cases we have studied we have noticed certain grounds:—

(1) Proof of the respondent's guilt (in particular, his or her unfaithfulness), and conduct making further conjugal life impossible.

(2) Matrimonial offences on both sides rendering further conjugal life impossible.

(3) Impossibility in fact of continuing conjugal life, not attributable to the fault of either party (*e.g.*, disappearance of the respondent, permanent insanity).

THE DISTINCTION BETWEEN DIVORCE AND NULLITY

A situation frequently arises in divorce cases in post-war conditions which reveals that the courts are mechanically applying the provisions governing divorce procedure. We have in mind the case frequently met with nowadays where a previous spouse reappears after being presumed dead.

Here is a typical case from life. Mr. L and Miss V were married in 1943. L had been married before, and his first wife and his son by that marriage had remained in one of the southern towns temporarily occupied by the enemy. L had reliable information that his wife and son had been killed; but early in 1944 it turned out that they were still alive. When they reached L's town, the question of his returning to them arose, and the fate of L's second marriage had to be decided. As in other similar cases the court applied the procedure of dissolving the marriage. It naturally granted the decree; but the use of divorce procedure involved a number of orders and directions which certainly appear strange and raise the question whether divorce procedure is appropriate in such cases.

The court's efforts to reconcile the parties were incomprehensible. After L, as petitioner, had explained why he considered further marital relations with V impossible, since he was returning to his family, the court's invitation to be reconciled with V, as the minutes of the proceedings record, appears strange. Obviously in such a case there was no point in attempts at reconciliation, and the only justifiable intervention in L's affairs would have been to encourage him to return to his first wife and son.

There was a further order in this case. Bound as the court was by section 27 of the Decree to impose the fee therein prescribed on one or both parties, it ordered the petitioner to pay. This order cannot be justified by any rational argument. Why should a petitioner whose conduct is irreproachable, and who had no alternative but to ask for the dissolution of his second marriage be penalised?

Take another case met with in practice. A married B, concealing the fact that he was already married. B thereupon petitioned for a divorce, not wishing to live with a bigamist. But she had to follow the procedure laid down. Once more the impropriety of the procedure is evident, when the people's court has 'to take steps to reconcile the parties'. It is a strange situation when the court is bound to reconcile the petitioner with a law breaker.

The whole position arises because divorce procedure is wrongly applied to cases of nullity. The correct procedure would be to

annul the marriage, not to dissolve it, and this would obviate the incongruities of which we have spoken. The question of reconciliation would not arise, since this is provided for only in cases of dissolution. The imposition of the special fee would also not arise, the parties being liable to pay only the normal court fees. And the whole procedure would be much simplified, since the Civil Procedure Code would apply and the people's court would have full jurisdiction.

The avoidance of marriage is insufficiently dealt with by our laws. In the Marriage Codes of some Republics there are sections on the invalidity of marriages⁴; but the Codes of other Republics⁵ do not refer to it. When new legislation on marriage is drafted, the question must be settled for the whole of the U.S.S.R. But even now, we think, the courts should follow the general sense of the Decree, which provides that a registered marriage creates a change of status, and, in cases where a marriage is to be avoided because it was invalid, not apply divorce procedure but annul the marriage.

MAINTENANCE OF A SPOUSE AFTER DIVORCE

The Decree does not refer to maintenance of a divorced spouse. But this omission should not be interpreted as in any way affecting the right of a divorced spouse who is in need, and unfit for work, to claim assistance from the other spouse, or the duty of the latter to provide such assistance if his (her) means permit. Sections 14-15 of the Marriage Code are substantially unaffected by the Decree and remain in force.

Indeed, we are inclined to think that the subject has acquired even more importance. The Decree aims at enlarging the responsibilities arising from marriage, and in this connection the maintenance of a disabled spouse is obviously not unimportant. It is, therefore, unsatisfactory that the right to maintenance has not been clarified in judicial divorce proceedings; for in the several hundred divorce cases which we have studied there was not one where the court had ordered maintenance.

To remedy this shortcoming we think our Legislature must more carefully define the divorced spouse's right to maintenance. The provisions of the Codes of the different Republics vary considerably; there are at least six different solutions of the problem.

In one group of Republics (R.S.F.S.R., Kirghizia, Kazakhstan, Carelo-Finland, Latvia, Lithuania, Estonia) a spouse in need and unfit for work is entitled to maintenance for a year after dissolution; but this right is otherwise unconditional, independently of the date

⁴ Ukraine (ss. 113-6), Georgia (ss. 7-13), Azerbaidjan (s. 12), Turkmenia (ss. 8-9), White Russia (ss. 11-17). The Ukrainian Code operates in Moldavia.

⁵ There is no reference in the Codes of the R.S.F.S.R., Uzbekistan or Tadjikistan. The R.S.F.S.R. Code operates in Kirghizia, Kazakhstan, Carelo-Finland, Lithuania, Latvia and Estonia.

or cause of the disability. (See, *e.g.*, sections 14-15 of the R.S.F.S.R. Marriage Code.)

The Turkmenian Code contains a different provision: the right to maintenance lasts also for a year, but the disability must have arisen before the divorce (sections 15-16).

We find a third solution in the Uzbek and Tadjik Codes (sections 11 and 12 in each): the period is three years, and the disability must have arisen before the divorce.

The fourth solution, in the Georgian Code (sections 22-23) is somewhat different: the period is again three years, but the disability must either have arisen before or during the marriage, or since its dissolution, provided that it has some connection with the marriage.

The fifth variation (Ukraine, Moldavia, Azerbaidjan) provides no time limit for maintenance, but the disability must have arisen before, during or within one year after the existence of the marriage, and the right to maintenance ceases on remarriage. (Ukrainian Code, ss. 128-129; Azerbaidjanian Code, ss. 29-30.)

Finally, White Russia provides the sixth solution: there is no time limit, and no conditions as in other Republican codes.

So it will be seen that there is an exceptional variety of Republican legislation on this important matter. We imagine that the future Family Code, which will standardise this subject for all Republics, must impose a wider liability for maintenance of a disabled spouse on divorce than is prescribed, for example, in the present section 15 of the R.S.F.S.R. Code. This would be in greater conformity with the moral side of marriage and the tendency of our legislation.

But pending the passing of the new law, which in our view is overdue, it is desirable that our courts should recognise this tendency if only by more frequent application of the existing provisions as to maintenance.

THE SURNAME AFTER DIVORCE

The Decree provides that where the court dissolves a marriage it must 'grant to each spouse, upon application, the right to use his or her pre-marital surname'.

The question of the surname has both a practical and a theoretical importance. Very serious interests of citizens are often involved. The question does not, of course, arise when both parties on marriage have elected to retain their pre-marital names. But when one of the spouses (in practice most frequently the wife) has adopted the name of the other, a difficult question often arises on divorce: what should be the surname of the spouse who changed her (his) name on marriage? The most varied moral, psychological and financial considerations arise. The desire that the divorce should utterly extinguish the relationship; the reluctance to bear

the name of an ex-spouse who has disgraced himself before society—these and many other factors may underlie the wish to have the pre-marital name restored.

Some factors may operate in the opposite direction. A wife, for example, who has lived for some years under her married name, may wish to retain it after divorce because under it she has acquired some reputation in literature, in art, at work or in a profession; and the longer the marriage has lasted the stronger this motive will be. Or when the wife is left with children, she may wish to retain her married name so that the children's name is the same as hers. There may be other factors: thus, in one case a husband who had adopted his wife's name on marriage petitioned to be allowed to retain it after divorce on the ground that his previous name was not euphonious! Moreover, the spouse whose name has been adopted may have some objection to the other spouse retaining it.

The Decree of 1944 made a change in the law. Previously the Marriage Codes of the different Republics provided that the spouse who had adopted the name of the other on marriage might continue to use it after divorce only where there was no objection by the latter. If the latter did not consent, the former reverted to his (her) pre-marital name.⁶ The Decree now provides that such consent is unnecessary. A spouse reverts only if he or she wishes to do so.

Since women are affected in the great majority of cases, the new rule reflects the rising stature of women in Soviet society, and illustrates the desire of the State to maintain the personal dignity of women by allowing them to decide this intimate question for themselves, irrespective of the wishes of their husbands.

Here, again, the close parallel between the marriage and divorce laws may be observed. A wife is not obliged to adopt her husband's name on marriage. Her personality is in no way subordinated to his, and both husband and wife may freely choose their respective surnames.⁷ Similarly, on a divorce, the Decree now enables each party to decide this matter as he or she thinks best.

Our study of decided cases has revealed that the courts have frequently failed to grasp the change introduced by the Decree, and have consequently given erroneous decisions.

In one case, for example, the court stated in its judgment: 'The petitioner applies that his wife shall resume her maiden name S. The respondent objects, and desires to retain her married name. The court orders that she shall resume her maiden name'.

In *P. v. P.*, the wife made no application to resume her maiden name; but the husband applied that she should, and the court so ordered, although the effect of the Decree is that if the spouse

⁶ See, e.g., R.S.F.S.R. Marriage Code, s. 21, now repealed.

⁷ See, e.g., R.S.F.S.R. Marriage Code, s. 70.

concerned does not apply to revert, he or she retains the married name.

In *R. v. R.*, the wife respondent not only made no application to revert, but actually applied to be allowed to retain her married name, and, moreover, gave reasons: 'I do not wish my children to have a different surname from mine'. Yet the court ordered a reversion.

In *D. v. D.*, the wife respondent did not appear, but asked the court to hear the case in her absence, stating that she had no objection to a divorce. She made no application concerning her surname. But the petitioner applied for an order that she should resume her maiden name, and the court granted his application.

Even where the courts correctly allow the wife to retain her married name, they sometimes do so for the wrong reasons, instead of simply stating that there has been no application to revert. In the judgment in *G. v. G.*, for instance, there is the following passage: 'The husband desires his wife to revert to her maiden name. The respondent desires to retain her married name. Whereas the respondent has a daughter who bears the married name, the respondent is permitted to retain it'. And in *V. v. V.*, the court allowed the wife to retain her married name on the ground that the husband 'had no objection'.

Obviously all such judgments are based on the old law now repealed.

THE FEE FOR DIVORCE

The Decree provides that the court, on granting a divorce, must fix a sum between 500 and 2,000 roubles payable to the registry office by one or both parties as the court may direct, in exchange for a divorce certificate. This provision is still obscure and controversial.

What does this sum represent, what is its function in a divorce? Is it just a variety of State tax? What principles should guide the court in fixing the amount and in ordering one or the other or both parties to pay it? Is the lower amount of 500 roubles a minimum binding on the court, or may the court reduce it or completely excuse both parties from paying it; and if so, in what circumstances? These are all questions which seem to us to require further elucidation.

The object of the provision was to set up a financial obstacle to discourage frivolous divorces. This accords with other provisions in the Decree which put greater difficulties in the way of divorce than formerly existed. The increase in the fee payable continues the policy already adopted by the order of June 27, 1936, when the Government once before raised the payment due on registration of a divorce.

We would submit that liability for the fee should be related to the grounds on which the divorce is granted, as follows:—

(1) Where one or both parties are at fault, the fee should be paid by such party or parties.

(2) Where the divorce is by mutual consent, the fee should be paid by both parties.

(3) Where the ground for the divorce is the factual impossibility of further marital relations (*e.g.*, disappearance of one spouse, or permanent insanity) the petitioner should pay the fee.⁸

A study of the decided cases shows that where the court fails to impose liability for the fee in accordance with the grounds of the divorce, it gives judgments which are open to criticism.

For example, in *M. v. M.*, a divorce was granted to the wife petitioner on the grounds that the husband had deserted the wife, gone to another town, and taken up with another woman. Although the husband's conduct was held by the court to justify the divorce, the court ordered the petitioner to pay a fee of 500 roubles.

In *I. v. I.*, the court granted a divorce on the wife's petition, finding that she had proved her allegations that her husband was a dissolute and confirmed drunkard and thrashed their child. But the judgment contained an order that the petitioner pay the fee. Obviously simply because she was the petitioner.

In *S. v. S.*, a wife's petition, the court found that the petitioner was to blame for the failure of the marriage, and that the respondent was in no way to blame. Yet liability for the fee was placed on both parties.

In *N. v. N.*, the wife petitioned on the ground that during the war the husband had deserted several times, for which he had been convicted. The judgment reads: 'The petitioner prays for a divorce since she no longer wishes to endure the shame of her husband, or to live with a traitor'. The court granted the decree, but once again, obviously because the respondent did not appear, and it was supposed that the fee must be paid by the party bringing the proceedings, the petitioner was ordered to pay.

It is submitted that the financial position of the parties ought also to be taken into account. In practice the attitude has been adopted that the general provision of the Civil Procedure Code⁹ giving the court the right to take financial circumstances into account when ordering litigants to pay fees does not apply to the fee prescribed by section 27 of the Decree of 1944. Among the several hundreds of divorce cases which we have studied, there is no

⁸ In these cases, according to an article in *Moscow News*, April 1947, the fee is now excused altogether.

⁹ R.S.F.S.R. Civil Procedure Code, s. 43: 'Fees or costs in the course of judicial proceedings shall not be imposed upon: . . . (f) workers found by an order of the people's judge or the court hearing the case not to possess sufficient means to pay such sum'.

case where the amount was fixed at less than 500 roubles or excused altogether.

We consider this attitude erroneous and based on a mistaken view of the law. The fee is expressly defined as a variety of unified State tax in the Order of the Council of People's Commissars of the U.S.S.R. of August 24, 1944.¹⁰ It is imposed 'in the course of judicial proceedings', even though it may be collected by the registry office. In our opinion, therefore, the court possesses the right given by section 43 of the Civil Procedure Code to reduce the sum or to excuse it altogether.

THE EFFECT OF REGISTRATION

Finally, let us consider a difficult and controversial question—the relationship between the judgment granting a divorce and the registration of the divorce in the registry office.

Where a decree of divorce has been pronounced but not yet registered, no divorce certificate has been issued, and no fee paid, what is the legal position of the spouses? Are they divorced, or are they still married until registration of the divorce?

If all legal consequences were held to flow from the judgment itself, there would be no incentive to register the divorce and pay a substantial fee. The penal effect of the fee would disappear.

We think the right view is that the judgment gives each spouse the opportunity of enforcing it, but only by an application for registration. It gives a right to a divorce, but does not order it. The parties can, if they wish, remain married, if they do not apply for registration. This view would agree with the general tendency of our law to ensure the maximum caution and deliberation in divorce cases.

Either spouse should be entitled to apply for registration and the issue of a divorce certificate, whether or not he is the one liable for the fee. We think the registry office has been wrong in certain cases within our knowledge in refusing a certificate to the spouse excused from payment. Such spouse should not have to depend on an application being made by the other spouse, and in such a case the registry office should issue the certificate, and, if necessary, enforce payment of the fee by execution.

G. M. SVERDLOV.

¹⁰ See article 2 of this Order (1944, No. 13, s. 178).

BAXTER v. BAXTER IN PERSPECTIVE

THE rule in *Cowen v. Cowen*,¹ the so-called 'contraceptives case', after a brief but not unsensational career, has now gone. It decided, of course, that where throughout the marriage one partner had refused to permit sexual intercourse except with the use of contraceptives or coitus interruptus then the marriage had not been consummated, and the other partner could have the marriage annulled provided he or she had not acquiesced in this course of conduct. It was followed by a spate of petitions on similar grounds. Most of these were unreported, but of those that were the most remarkable was *J. v. J.*,² in which a wife succeeded in having annulled in 1947 a marriage celebrated in 1934 because immediately prior to the marriage the husband had had himself sterilised by an operation performed with her knowledge, though against her wishes.

In both these cases it was the wife who petitioned. In *Baxter v. Baxter* the husband petitioned on the ground that the wife had refused to permit him intercourse unless he used a contraceptive sheath.³ Both the judge of first instance and the Court of Appeal⁴ dismissed the petition on the ground that, as he had submitted to the wife's demands for ten years he was barred by acquiescence. The House of Lords⁵ unanimously overruled this decision. They held that there was no acquiescence as the husband had always protested and had only used contraceptives because he would have had no intercourse at all if he had not; nor could he be blamed for the ten years' delay as he could hardly be expected to anticipate the decision in *Cowen v. Cowen*. On the other hand they decided that the marriage had been consummated and that *Cowen v. Cowen* was wrongly decided.

The judgment aroused perhaps greater public interest than any legal decision in recent years; the correspondence columns of the newspapers were filled with comments (mainly adverse), questions were asked in the House of Commons,⁶ and a statement was issued by the Archbishop of Canterbury.⁷ Undoubtedly it raised questions of far-reaching social consequence on which the opinions of the public are as divided as those of the judiciary. But before these

¹ [1946] P. 36 (C.A.).

² [1947] P. 158 (C.A.).

³ Whether the *Cowen v. Cowen* rule would have applied to a case where the wife alone had used contraceptives was discussed by the H.L. in *Baxter v. Baxter*, [1947] 2 All E.R. 886 at p. 892, but it is now of only academic interest.

⁴ [1947] 1 All E.R. 387.

⁵ *Supra*, note 3.

⁶ See *The Times* newspaper, Jan. 27, 1948; *Hansard*, Jan. 26, p. 656.

⁷ *The Times* newspaper, Feb. 6, 1948.

matters can be discussed it is necessary to analyse the grounds of the decision and to consider it in relation to other recent cases in order to see exactly what the present legal position is. Much of the recent discussion has been of limited value because the decision has been dealt with in isolation and neither it nor its context seems to have been fully understood.

Wilful refusal to consummate was introduced as a ground for a nullity decree by the Matrimonial Causes Act, 1937, s. 7 (1), which provides :—

‘ A marriage shall be voidable on the ground—

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage ’.

This new ground supplemented the existing ground of incapacity to consummate, and the courts had already gone some distance in this direction by recognising that invincible repugnance to the sexual act constituted incapacity notwithstanding that there was no physical impediment.⁸ Similarly it was clear that the law accepted as sufficient a psychological incapacity of the type, recognised by medical science as not uncommon, in which the inability to consummate existed only in relation to the other spouse and not generally.⁹

Nevertheless the extension was somewhat anomalous because, as has often been pointed out,¹⁰ all other grounds for nullity depend on circumstances existing at the time of the celebration of the marriage whereas the new ground depends on subsequent conduct. It is therefore arguable that it should have been made a ground for divorce, and this would certainly have avoided some absurd consequences exemplified by the recent cases of *Dredge v. Dredge*¹¹ and *Re Dewhirst*.¹² But to this there were two objections :—

1. The Act of 1937 imposed a bar on divorce within three years of marriage and such a bar would obviously be inappropriate in this case.

2. The new ground is closely related to the existing ground of incapacity and it is often difficult to decide whether in fact non-consummation is due to incapacity or wilful refusal. Hence the convenient practice has been to petition on both grounds in the alternative, and it is often a toss-up which the court will choose.¹³ In both cases one of the main points for decision is whether the

⁸ *G. v. G.*, [1924] A.C. 349.

⁹ *Ibid.*

¹⁰ This is stressed in the Primate's recent statement, *supra*.

¹¹ [1947] 1 All E.R. 29. Annulment bastardising child born of pre-marital intercourse who had been legitimate for seventeen years!

¹² [1948] 1 All E.R. 147. Wife held entitled to interest during widowhood in first husband's estate after second marriage annulled.

¹³ In an unreported case this term the court, to everyone's surprise, chose incapacity notwithstanding that the marriage had lasted for thirty-four years.

marriage has been consummated, and the Act does not define consummation. In essence the difference of judicial opinion revealed in *Cowen v. Cowen* and *Baxter v. Baxter* depended on a differing interpretation of this term, although this simple issue was complicated by differing ideas on the true purpose of marriage.

What, then, is the exact meaning of consummation?

In the first place it is clear that it has nothing to do with conception; a marriage may be annulled despite the birth of a child conceived as a result of fecundation *ab extra*,¹⁴ and cannot be annulled merely because either or both parties are naturally sterile.¹⁵ In *Cowen v. Cowen*, Pilcher, J., the judge of first instance, held that consummation meant penetration and that the marriage was consummated when complete penetration had taken place despite the use of any measures to prevent conception. The Court of Appeal¹⁶ thought otherwise. They quoted¹⁷ the words of Dr. Lushington in *D—e v. A—g*¹⁸ that 'sexual intercourse in the proper meaning of the term is ordinary and complete intercourse; it does not mean partial and imperfect intercourse . . .', and they continued, 'we are of the opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents that natural termination. . . . To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated'. The subsequent case of *J. v. J.*¹⁹ carried this doctrine even further, since there the husband could effect penetration and emission, although the operation had prevented any possibility of its resulting in conception.

To succeed in annulling a marriage under section 7 (1) two things have to be shown: (a) non-consummation, and (b) that this is due to the wilful refusal of the respondent; and it is suggested that the judgments display some confusion between these two essentials. In both *Cowen v. Cowen* and *J. v. J.* there was undoubtedly a wilful refusal on the husband's part to fulfil what most people would regard as his matrimonial duties. But if intercourse by a naturally sterile husband constitutes consummation it is difficult to understand why identical intercourse by an artificially sterile one should not. It seems that the Court of Appeal, in a laudable desire to uphold the rights of the wife and to express their

¹⁴ *Clarke v. Clarke* (1943), 112 L.J.P. 41.

¹⁵ If the rule were otherwise no woman beyond the age of child-bearing could enter into an unassailable marriage.

¹⁶ *Scott, du Parc and Morton, L.JJ.*

¹⁷ [1945] P. at p. 40.

¹⁸ (1845), 1 Rob. Eccl. 279 at p. 298.

¹⁹ *Supra*. Somervell and Cohen, L.JJ., and Lynskey, J.

abhorrence of the conduct of the husband,²⁰ said in effect 'there is a wilful refusal, therefore there cannot be any consummation'. This, however, was a *non sequitur*.

The *Cowen v. Cowen* rule therefore proceeded on the basis that one of the principal ends of marriage is the procreation of children. This principle was commendable in itself, but whether nullity was the appropriate remedy was, at least, very questionable. In our view the marriage should be regarded as consummated but the wife should be entitled to a divorce.

Unfortunately in the then state of the law it seems that she would have no grounds for one. It had been held that a mere refusal of sexual intercourse did not constitute desertion²¹ (and therefore presumably not cruelty either), though it gave the other spouse 'good cause' for leaving and prevented this being desertion by her.²² If this was so in the case of a refusal of any sort of intercourse, it was obviously the same in the case of a refusal of intercourse except with contraceptives. Hence it appeared that if once the marriage had been consummated neither party had any remedy against the other.

This seemed totally inconsistent with the principle on which *Cowen v. Cowen* was decided. The social consequences of a subsequent refusal and the injury to the other partner are almost, if not quite, as great. Moreover in Scotland it had been recognised since 1905 that a malicious refusal of intercourse might constitute desertion.²³ It was therefore thought that, in view of *Cowen v. Cowen*, the rule established in the earlier English cases might well be overruled when the point next came before the courts.

In *Weatherley v. Weatherley*²⁴ this issue arose in the simplest form. The marriage, a childless one, had been consummated but after some six months the wife informed the husband that she had finished with sexual intercourse and that he was at liberty to seek gratification elsewhere. The parties nevertheless continued to share the same house for another two years, when the husband left, and

²⁰ See [1946] P. at p. 40. "Further we would point out that, if the judgment of the learned judge were right, a wife who was ready and willing to consummate the marriage in the fullest sense, but refused to permit intercourse in a manner which deprived her of the opportunity of bearing children, would be subject to what seems to us to be an obvious and an intolerable injustice. We say this because it would seem to follow . . . that she would have no answer to a petition by the husband founded on an allegation that she had wilfully refused to consummate the marriage"—*per du Parcq, L.J.*, delivering the judgment of the court. For comments on this, see below.

²¹ *Jackson v. Jackson*, [1924] P. 19.

²² *Synge v. Synge*, [1900] P. 180; [1901] P. 317; *Davis v. Davis*, [1918] P. 85. In *Synge v. Synge*, *Jeune, P.*, thought that in such a case the other party would then be guilty of constructive desertion. The C.A. expressed no opinion on this.

²³ See the cases quoted in 62 L.Q.R. p. 223. (*Goold v. Goold*, [1927] S.C. 177, and earlier cases there cited.) It is understood that a similar rule prevails in most continental countries.

²⁴ [1946] 2 All E.R. 1 (C.A., Scott and Tucker, L.JJ., and Evershed, J.); [1947] A.C. 628 (Lords Jowitt, L.C., and Wright, Simonds, Uthwatt and Normand).

after three years from the initial refusal of sexual intercourse petitioned for divorce on the ground of desertion. The trial judge, on whom *Jackson v. Jackson* ²⁵ was binding, dismissed the petition. His decision was upheld by the Court of Appeal, but Scott, L.J., delivered a powerful dissenting judgment based in effect on the arguments used in *Cowen v. Cowen*. The House of Lords unanimously dismissed the appeal.

Surprisingly, this decision aroused nothing approaching the public attention which the subsequent *Baxter Case* received. Yet the fundamental issue—what is the purpose of marriage and what is the effect of a wilful refusal to fulfil this purpose?—was the same and it was presented in a much clearer form. The overruling of *Cowen v. Cowen* was not surprising; as has been suggested there were objections to it even if one fully accepts the view of the Court of Appeal as to the true purpose of marriage. But in *Weatherley v. Weatherley* the issue was not complicated by definitions of consummation or considerations of the effect of the use of contraceptives; the House simply refused to recognise that a breach of at least one of the essentials of marriage gives rise to a legal remedy. That the procreation of children is the primary purpose of marriage is certainly the Christian view, and the conduct of the wife wilfully frustrated this purpose and indeed went considerably further. As Scott, L.J., said ²⁶: ‘The marriage service in the Book of Common Prayer calls upon the congregation to consider the causes for which matrimony was ordained: “first, the procreation of children . . .; secondly, for a remedy against sin and to avoid fornication . . .; and thirdly, for the mutual society, help, and comfort that the one ought to have in the other”. If these be the essentials of marriage, and I cannot but think they are, the conduct of the wife in the present case seems to me to have repudiated all three’. Similarly the Primate in his statement ²⁷ says: ‘The doctrine of the Church is and remains that procreation of children is one of the principal ends, if not the principal end, of marriage. . . . It is the Christian duty of man and wife, unless prevented by physical causes, to have children: and either party by seeking to prevent this against the will of the other, is guilty of grave sin in defrauding the other and disregarding mutual marital obligations’. The same view is certainly adopted even more strongly by the Roman Catholic Church and it is thought that it would be supported by all Christian and many non-Christian religions. Indeed, it is thought that it would be generally accepted on social as well as religious grounds. Again we quote Scott, L.J.: ²⁸ ‘The *Encyclopaedia Britannica*, 11th ed., Vol. 17, p. 753, contains this definition of marriage: “a physical, legal and moral union between man and woman in complete community of life for the establishment of a family”. In both

²⁵ *Supra*, n. 21.

²⁷ *Supra*, n. 8.

²⁶ [1946] 2 All E.R. at p. 4.

²⁸ At p. 4.

analyses, the religious and the secular, the physical union takes first place—as is right for the maintenance of our nation. On it depends the creation of the family. On the family depends the welfare of the nation’.

Baxter v. Baxter has been denounced by many as contrary to public policy, but as we shall see there are arguments of public policy that can be raised in its favour. *Weatherley v. Weatherley*, on the other hand, has little to commend it except the purely legal arguments that appealed to the majority, namely, that desertion implies a cessation of cohabitation and not a mere cessation of intercourse. On grounds of religion, morals and social justice it is difficult to support the decision. This was virtually admitted by the Lord Chancellor when he said ²⁹: ‘The fact is that the law of the land cannot be co-extensive with the law of morals, nor can the civil consequences of marriage be identical with its religious consequences . . . and . . . we shall, I think, find the solution to the question which arises for determination in this case and in similar cases, not on a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer, but on the true construction of the relevant Acts of Parliament’. Accepting this as a true general statement, one may still suggest that the law of the land ought to be co-extensive with the law of morals wherever possible and that it is difficult to see why it should be impossible in this case.

The only grounds of policy put forward in favour of the decision were :

First, that stated by Evershed, J. (as he then was), in the Court of Appeal ³⁰: ‘If marital relations are to be considered as fundamental to the marriage union and their refusal constitutes desertion, the question might well arise whether a spouse could avoid the penalty of desertion by submitting to such relations only upon rare, and if so how rare, occasions’. It is respectfully suggested that this objection is somewhat unreal. When disagreements of this nature arise and if one partner is not prepared to submit to the demands of the other, sooner or later there will be a complete refusal. If the demands are unreasonable the importunate partner will be guilty of desertion if the other leaves ³¹ if the demands are reasonable the refusing partner should be guilty of desertion. It is difficult to imagine a union in which one spouse says to the other : ‘I can keep on the right side of the law by agreeing to intercourse once a quarter, and I ration you to this’, but if this situation should arise the test of reasonableness should supply the answer.

Secondly, there is the argument put forward by the Lord Chancellor ³² ‘It is . . . most undesirable, save where we are clearly

²⁹ At p. 633.

³⁰ At p. 11.

³¹ See *Holborn v. Holborn*, [1947] 1 All E.R. 32.

³² At p. 634.

enjoined by statute so to do, to seek to discover or reveal the secret intimacies of the marriage bed'. This, it will be noted, is in effect a return to the so-called public policy on which the rule in *Russell v. Russell*³³ was based. But this rule is generally recognised as having been fruitful of nothing but confusion and injustice and its abolition was recently recommended by the Denning Committee.³⁴ It is therefore surprising to find a return to it in a new connection, and it is not thought to have anything to commend it. It is quite true that, though 'sexual relations constitute a most important attribute of the conception of marriage . . . they do not constitute its whole content, nor can the remaining aspects . . . be said to be of a wholly unsubstantial or trivial character'.³⁵ But, as this dictum admits, sexual relations are a most important attribute of marriage, and the experience of most lawyers confirms the opinion of psychiatrists that sexual maladjustments are perhaps the commonest root cause of unhappy marriages. If, therefore, a judge of a matrimonial cause refuses 'to seek to discover the secret intimacies of the marriage bed' he deliberately shuts his eyes to what is probably the root of the trouble and can hardly be sure of arriving at the right solution. 'Justice', as Lord Atkin once said, 'is no cloistered virtue', and excessive delicacy is as out of place in the Divorce Court as in the consulting room.

As we have seen,³⁶ the contrary rule has been regarded as settled in Scotland since 1905, without apparently any anti-social consequences. Is there one rule of public policy for Scotland and another for England and Wales? Further, the Gorrell Commission³⁷ recommended in 1912 that to remove doubts it should be clearly stated that wilful refusal to permit sexual intercourse should be treated as amounting to desertion. They certainly did not consider that there were any objections on grounds of public policy; on the contrary.

To avoid any possible misunderstanding it should be made clear that in arguing that wilful refusal should be treated as desertion we are not suggesting that there may not be cases in which there is good cause for the refusal which will accordingly prevent it from giving rise to any legal remedy. This type of desertion, like any

³³ [1924] A.C. 687.

³⁴ Final report of the Committee on Procedure in Matrimonial Causes (Cmd. 7024/47).

³⁵ *Per* Evershed, J., at p. 11.

³⁶ *Supra*, n. 23. These Scottish cases have never been reviewed by the H.L. and must now be regarded as doubtful. They were quoted in *Weatherley v. Weatherley*, but distinguished on the ground that the laws of divorce for desertion have different histories in the two countries. *Per* Lord Normand, at p. 635.

³⁷ Majority report of Royal Commission on Divorce and Matrimonial Causes, paras. 260 and 327, quoted by Evershed, J., at p. 11.

other, is subject to the condition that it must be without cause.³⁸ As we have seen the Archbishop would limit such causes to physical disabilities, but it seems obvious that the courts would have to take other matters into account; the financial position of the parties or their housing situation might well make it reasonable for one to deny the wish of the other to have a child. Similar considerations arose in *Cowen v. Cowen*, where it was held that it was reasonable for the parties to agree not to have children while they were living in a country where the climatic and medical conditions made it undesirable for European women to bear children.

If, however, *Weatherley v. Weatherley* cannot be welcomed it is important not to exaggerate its effect. In particular, it must be noted that it did not definitely decide that if the partner who is denied sexual intercourse actually leaves he cannot *then* contend that the other spouse has constructively deserted him. It certainly comes close to deciding it; this seems to have been the opinion of the majority of the Court of Appeal and the Lord Chancellor appears to doubt the validity of the whole doctrine of constructive desertion.³⁹ Nevertheless the point may still be open. Moreover it only decides that the *mere* refusal of sexual intercourse is not desertion; it does not deny that this is an important element for consideration in connection with the other conduct of the parties.⁴⁰

Such then was the position when, a few months later, *Baxter v. Baxter* reached the House of Lords. As the composition of the House was the same (with one change⁴¹) as in the *Weatherley Case*, it was not surprising that they overruled *Cowen v. Cowen*; on the basis of their previous arguments they could scarcely have done otherwise.

In analysing the judgment, which again was delivered by the Lord Chancellor, it is not proposed to say anything more on the issue of acquiescence, but to concentrate on the main point: whether the marriage had been consummated. On this question the Lord Chancellor first pointed out⁴² that they were only concerned in that case with artificial methods of contraception and not also, as in *Cowen v. Cowen*, with coitus interruptus. He therefore expressed no opinion on this practice and it is still possible to argue that it would prevent consummation.⁴³ In view of what followed,

³⁸ The J.A., 1925, s. 176, specifically defines the matrimonial offence as desertion 'without cause', but the S.J. (Married Women) Act, 1895, s. 4, refers merely to desertion. It therefore seems sounder to regard absence of cause as an essential element in desertion itself.

³⁹ At p. 631-2. 'On some future occasion it may be necessary that this House . . . should consider whether there is sufficient warrant for the doctrine of "constructive desertion" which from time to time seems to have found favour'.

⁴⁰ See *Scotcher v. Scotcher*, [1947] P. 1, *infra*.

⁴¹ Lord Uthwatt took the place of Lord Merriman.

⁴² At p. 888.

⁴³ Cf. Lord Merriman, P., in *Rice v. Raynold-Spring-Rice*, *infra*.

however, it is not thought that this argument would have much prospect of success.

He also reserved 'the question what bearing the employment of force or fraud may have on the issue of consummation'.⁴⁴ Obviously what he had in mind here was whether a husband would still be able to petition for nullity against a wife who had refused voluntarily to allow him to consummate the marriage if he had on one occasion had intercourse by force or deceit. It is submitted that the answer must be that he would not. As we have seen, according to the wording of the Matrimonial Causes Act, s. 7 (1) (a), the petitioner has to establish two things: (a) that the marriage has not been consummated, and (b) that this is due to the wilful refusal of the respondent. In the circumstances under consideration (b) (wilful refusal) can perhaps be shown; it involves a mental element which is present notwithstanding any apparent consent to intercourse since this is vitiated by force or fraud. But element (a) (consummation) can hardly be other than a purely physical fact, the existence or non-existence of which cannot be affected in any way by force or fraud. It is submitted that to hold otherwise would be to confuse the two essentials, as it is thought that the Court of Appeal did in *Cowen v. Cowen*. Had the section read: 'A marriage shall be voidable on the ground of the respondent's wilful refusal to consummate the marriage', the answer might well have been different (and *Cowen v. Cowen* might still have been good law).

The Lord Chancellor then pointed out⁴⁵ that the arguments adopted by the Court of Appeal in *Cowen v. Cowen* and the precise point decided in *J. v. J.* were irreconcilable with the decision in *L. v. L.*,⁴⁶ which had not been cited in these cases. *L. v. L.* was also an example of artificially produced sterility, but the more usual case of the woman and not the man, and Horridge, J., held that the marriage had been consummated by intercourse notwithstanding the sterility. He said⁴⁷: 'Does a capacity of consummation mean penetration merely, or penetration followed by fertility? The authorities . . . certainly speak of the procreation of children as being essential to marriage, but the question is whether they refer merely to the capacity to procreate, or to the capacity to do an act which usually results in procreation'. He held the latter, and the Lord Chancellor agreed with him.

On this basis one would suppose that consummation was synonymous with penetration, but *D—e v. A—g*,⁴⁸ which was quoted by the Lord Chancellor, apparently with approval, makes it clear that it is not quite so simple, and the exact test of consummation is

⁴⁴ At p. 888.

⁴⁵ At p. 891.

⁴⁶ (1922), 38 T.L.R. 697.

⁴⁷ At p. 698.

⁴⁸ *Supra*, n. 18.

nowhere stated. The Lord Chancellor ends his consideration of this part of the subject by quoting Stairs' Institutes⁴⁹: 'So then it is not the consent to marriage, as it relateth to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date: but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds; as the general end of the constitution of marriage is the solace and satisfaction of man . . .'. He adds: 'I am content to adopt these words as my own', and certainly they describe a difficult subject with a delicacy which, as we have seen, is characteristic of the Lord Chancellor, but which, in this case has been carried almost to the verge of obscurity.

Having disposed convincingly of the *Cowen Case* on the basis of the earlier authorities, the judgment proceeded to give various reasons why these decisions were to be preferred on grounds of policy to that of the Court of Appeal. Some of these reasons seem sound, and indeed unanswerable; others are less satisfactory.

The major objection to *Cowen v. Cowen* pointed out by the Lord Chancellor⁵⁰ was that, if it had been upheld, the courts would be forced to consider the effect and reliability of the various types of contraceptive devices; he instanced a recent unreported case in which a decree had been refused because the court was satisfied that on one occasion there had been a hole in the sheath and that the wife had not used a pessary. It certainly seems absurd that the validity or invalidity of a marriage should depend on factors such as these, which would indeed lead the courts into 'a morass of difficulties'. It would involve far more than seeking 'to discover the secret intimacies of the marriage bed'; it would in fact impose an impossible task—to determine whether the contraceptives used had on every occasion effectively prevented the male seed from entering the body of the woman. This, it is submitted, is an unanswerable objection to the *Cowen v. Cowen* rule: where penetration has taken place it may still be possible to prove wilful refusal, but the other essential—non-consummation—is incapable of proof. Once it is admitted, as it must be, that contraceptives could only prevent consummation if they had always been effective, and once it is further admitted, as it must be, that short of a surgical operation no contraceptives are always and in all circumstances effective, the impossibility of the *Cowen v. Cowen* rule is apparent.

The next objection put forward was that it is repugnant to common parlance to describe a marriage as unconsummated merely because the parties have taken precautions. According to *Cowen v. Cowen* a very large number of marriages which have lasted happily for years have never been consummated⁵¹—a view which

⁴⁹ 1832, 1 tit. 4, para. 6.

⁵⁰ At p. 891-2.

⁵¹ Of course it does not follow that they would be voidable; normally mutual agreement would prevent the other element of wilful refusal.

would certainly startle the parties concerned. As the Lord Chancellor put it ⁵²: 'Long before the passing of the Matrimonial Causes Act, 1937, it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on . . . birth control and . . . many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation Parliament has used the word "consummate" as that word is understood in common parlance and in the light of social conditions known to exist'.

It is submitted that, so far, there can be no quarrel with the decision. It is the remaining part of the judgment which principally excited public attention and criticism, and with some justification. In it the Lord Chancellor questioned whether in fact the procreation of children is 'one of the principal ends, if not the principal end, of marriage', and although, as we have seen, this had been questioned in *Weatherley v. Weatherley* his second judgment certainly expressed his doubts on this score even more openly and clearly.

In this connection he quoted the famous dictum of Lord Penzance in *Hyde v. Hyde* ⁵³ that a marriage as understood in Christendom 'may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others'. It is difficult to understand the relevance of this quotation. Lord Penzance expressly limited his definition to the purposes of the question before him (whether the court would exercise matrimonial jurisdiction over a polygamous marriage) and it hardly seems fair to tear it from its context and to apply it for a totally different purpose.

He then considered the language of the Church of England marriage service and, after repeating the arguments used in *Weatherley v. Weatherley*, that too great reliance should not be placed upon its phraseology, he suggested that in any case its essence was not so much the procreation of children as the assurance that any that were born should be born into a Christian family and nurtured in their parents' faith. This interpretation subsequently received support from one eminent divine, but we are absolved from pursuing this theological discussion as it has been categorically declared to be a heresy by the Primate ⁵⁴ of the Church of England, who may be accepted as a final authority on the meaning of his Church's Prayer Book.

Before leaving *Baxter v. Baxter* it may be pointed out that the House did not deal with one argument put forward by the Court of Appeal in *Cowen v. Cowen*, ⁵⁵ namely, that but for the decision in the latter case 'a wife who was ready and willing to consummate

⁵² At p. 892.

⁵³ (1866), 1 P. & D. 130 at p. 133.

⁵⁴ *Supra*, n. 7.

⁵⁵ *Supra*, n. 20.

the marriage in the fullest sense but refused to permit intercourse in a manner which deprived her of the opportunity of bearing children . . . would have no answer to a petition by the husband founded on an allegation that she had wilfully refused to consummate the marriage'. This, however, seems to be another *non sequitur* based on the confusion between 'non-consummation' and 'wilful refusal'. The wife fails to have the marriage annulled not because there has not been wilful refusal but because the marriage has been consummated; if, however, she refuses to submit to her husband's demands the marriage has not been consummated, and as this is due to the wilful conduct of the husband it is thought that the wife, and not the husband, could successfully petition. Certainly there is nothing in the judgment of the House to suggest the contrary.

A further argument in favour of *Baxter v. Baxter* was put forward by the Archbishop in his statement to which reference has already been made.⁵⁴ Although emphasising that in the eyes of the Church the marriage would not be consummated, he nevertheless welcomed the decision as salutary in the public interest, mainly on the ground that *Cowen v. Cowen* had opened the door to collusive nullity petitions and therefore to trial marriages. It certainly opened the door to nullity petitions, but unfortunately the Archbishop is mistaken in supposing that *Baxter v. Baxter* will in any way hinder collusive petitions. Possibly what he had in mind was that had the *Cowen v. Cowen* rule been upheld it would not have been possible to tell by a medical examination of the wife whether or not the marriage had been consummated. But if the parties are in collusion they have only to arrange for the husband to petition alleging his wife's wilful refusal, and in this event there need not be any medical examination of the wife and no one will know whether she is a virgin or not. Moreover, even if the wife petitions she does not have to prove that she is *virgo intacta* but merely to explain plausibly why she is not; the explanation may be intercourse with another man,⁵⁶ or even intercourse with the respondent husband prior to the marriage.⁵⁷

But although, in our view, many of the arguments used in support of *Baxter v. Baxter*, both in the House and outside, do not bear close examination, it is submitted that the actual decision is salutary and right. As the Lord Chancellor said,⁵⁸ nullity is not the appropriate relief in such cases and 'the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home form the background to some other claim for relief'. This important dictum seems to recognise that the appropriate

⁵⁶ *Burgess v. Burgess*, [1937] P. 60.

⁵⁷ *Dredge v. Dredge*, *supra*. Both in this case and *Burgess v. Burgess* a child had been born to the wife.

⁵⁸ At p. 892.

relief is divorce or judicial separation, but if so it represents a startling volte-face since the judgment a few months previously in *Weatherley v. Weatherley*. In that case 'the sexual life of the spouses and the responsibility of either or both for a childless home' certainly formed 'the background to some other claim for relief', but all the House did about it was to wash their hands of the whole affair and refuse any relief. How, then, can effect be given to the later dictum in view of the binding decision in the earlier case?

At this stage it may be convenient to sum up the legal position to date.

(1) If no intercourse has taken place owing to incapacity or wilful refusal the marriage can be annulled.

(2) If, however, intercourse has once taken place the marriage cannot be annulled even although contraceptives have always been used (*Baxter v. Baxter*).

(3) If thereafter one spouse refuses to permit intercourse, either completely or only if contraceptives are used, this does not constitute desertion or, presumably, any other matrimonial offence (*Weatherley v. Weatherley*).

(4) If the spouse who is denied intercourse then leaves the other it would appear (though this is not finally decided) that :

(a) the other party is not guilty of constructive desertion (*Weatherley v. Weatherley*); and

(b) the party who leaves is not guilty of desertion either (*Synge v. Synge*).

Hence neither party has any remedy against the other and they are tied to each other for all time or until one commits adultery or puts up a pretence of adultery sufficiently convincing to deceive the Court.

It can hardly be pretended that this is a satisfactory state of affairs; it frustrates the essential purposes of marriage, perpetuates unions that have utterly failed, and is a direct incentive to immorality, sexual and social.

Undoubtedly the cleanest and quickest way out of the mess would be to amend the Matrimonial Causes Act, 1937, but this the Government have declined to do.⁵⁹ The question put to the Attorney-General in the Commons was unfortunately worded since it referred solely to *Baxter v. Baxter*, whereas in our view it should rather have mentioned *Weatherley v. Weatherley*, but presumably the Attorney-General was familiar with both decisions and if so his answer can only be regarded as profoundly unsatisfactory. He said '... this is one of the fields of intimate human relationships which cannot in our view properly be dealt with by legislation. It is possible that, in the circumstances of some particular case, the courts may have to decide what the effect of the use of contraceptives against

⁵⁹ *Supra*, n. 6.

the wish of one of the spouses may be. We think it had better be left to the courts in the particular circumstances of the case'.

There are at least six answers to this:

(1) The problem is by no means limited to the effect of the use of contraceptives.

(2) The idea that there is some general principle that problems of social justice are best left to the chances of litigation is a fallacy against which this *Review* has always protested and will continue to protest. If Parliament serves any purpose it is surely to remedy social injustices so soon as they become apparent and not to leave remedial action to the chances of private litigation after injustice has been done. The contrary argument is a strange one to be put forward by a Labour Government whose case for the Parliament Bill is that the Upper House is not a qualified arbiter of public opinion on 'difficult and controversial social issues' (the Attorney-General's own description of the present problem); yet they are apparently here prepared to abdicate in favour of the Upper House in its judicial capacity.

(3) The question has already been decided—inferentially—in *Weatherley v. Weatherley*; if a complete refusal of intercourse is not a matrimonial offence an insistence on the use of contraceptives equally cannot be. This is a decision of the House of Lords, and nothing but legislation can overrule it.

(4) This is hardly a reassuring example of the virtues of 'leaving it to the courts'. Legislation was recommended by the Gorrell Commission in 1912; instead it was left to the courts, which have taken thirty-five years to settle the point—and then to settle it the wrong way.

(5) In any case, this branch of the law has not been 'left to the courts'. Legislation has already trespassed into these 'fields of intimate human relationships'; the cases turn on the interpretation of the Matrimonial Causes Act.

(6) The courts themselves have denied that the problem is better left to them. In *Weatherley v. Weatherley*, Evershed, J., said⁶⁰: 'The truth is that if it is requisite that our marriage laws should conform to a logical coherence, that is a matter which the Legislature must declare and provide'. In our view considerably more than logical coherence is involved, but we agree that it is a matter for the Legislature.

Be that as it may, it seems only too clear that it will be left to the courts to extricate themselves from the morass. The question is, how are they to do it? Of the present rules summarised above, at p. 188, it is submitted that (1) and (2) are unobjectionable, that (3) is unfortunate but no worse, but that (4) is definitely anti-social. It seems likely that the answer to our question will be that

⁶⁰ [1946] 2 All E.R. at p. 12.

the courts will seize upon the final dictum⁶¹ of the Lord Chancellor in *Baxter v. Baxter* and use it to justify limiting the effect of *Weatherley v. Weatherley* by distinguishing it wherever possible and restricting it to rule (3).

This process has already started and *Weatherley v. Weatherley* has been distinguished (expressly or impliedly) in two subsequent cases. The first of these is *Scotcher v. Scotcher*⁶² which was heard by Willmer, J., after the decision of the Court of Appeal in the *Weatherley Case* but before that of the House of Lords. This was also a case of a refusal by the wife of any sexual intercourse but differed from *Weatherley*, first, because the husband had left the wife more than three years before service of the petition by him for a divorce on the ground of desertion. The learned judge held that this distinction was insufficient and that, as refusal of intercourse did not constitute desertion, the mere unilateral act of leaving by the husband could not convert it into desertion. As we have seen⁶³ this certainly seems to have been in accordance with the views of the majority of the Court of Appeal. But he then stressed the point previously emphasised, namely, that all that had been decided was that a mere refusal of sexual intercourse did not constitute desertion. It was nevertheless a factor to be taken into consideration in conjunction with other circumstances to decide whether an intention to desert might be inferred. In the present case the wife had not only refused the husband sexual intercourse, but had treated him with complete indifference, refusing to accompany him anywhere and saying she regretted having married him. The husband warned her that if she did not mend her ways he would leave her, and as she did not, he left. In these circumstances he held that the wife had deserted and he granted a decree. The essential feature, according to the judge, was to show 'an intention to desert' and 'the respondent must be taken to intend the natural and probable consequences of her acts, and if she behaves with a reckless indifference to the natural and probable (and, I may add, expressly threatened) consequences of her conduct, this would be sufficient evidence of an intention to desert'.⁶⁴

This case shows that provided the party refused intercourse has left the other he will certainly be able to establish constructive desertion if the conduct of the other shows an intention to cause him to leave. Whether an actual intention to drive him away was regarded by the judge as essential is not clear, as he nowhere referred specifically to an 'intention to drive away', but used throughout the vaguer expression 'an intention to desert'. In any case he certainly suggested that the test was objective not subjective; the wife was deemed to intend the natural and probable

⁶¹ Quoted above, p. 187.

⁶² [1947] P. 1.

⁶³ *Supra*, p. 181.

⁶⁴ At p. 11.

consequences of her acts. On the other hand he regarded the actual mental state of the wife as important; her refusal of intercourse had to be wilful and on this ground he distinguished *Beevor v. Beevor*,⁶⁵ where the wife's refusal was due to invincible repugnance or an inhibition beyond her control following childbirth.

The second case, *Rice v. Raynold-Spring-Rice*,⁶⁶ was subsequent to the decisions of the House of Lords in both *Weatherley* and *Baxter*. The wife had applied for a maintenance order alleging desertion and wilful neglect to maintain. The husband proved that the wife had consistently refused him normal complete intercourse and insisted on coitus interruptus and had refused to bear him the child that he desired. This attitude of the wife's led to constant nagging, displays of bad temper and a serious quarrel culminating in the announcement by the husband that he had finally decided that it was impossible to live with the wife any longer and his withdrawal from the matrimonial home. The justices dismissed the wife's summons and the Divisional Court upheld their decision.

The actual decision in this case goes no further than that in *Synge v. Synge*, i.e., that the husband had reasonable cause for leaving the wife, but what are interesting and important are the arguments adopted by the court. These turned entirely on the Lord Chancellor's final dictum in *Baxter v. Baxter*, which was described by Barnard, J., as 'almost prophetic of this case', and it is clear from the judgment of the President that he regarded the wife as having committed desertion. Not, he emphasised, for all time; despite the fact that she was no longer capable of child-bearing, she could 'determine and show she is determined to resume cohabitation in the full sense of the word', in which case it would be 'he who will assume the character of deserter'. But it seems clear that until she showed a change of heart he regarded her as the deserter. *Weatherley v. Weatherley* was not even referred to, yet on the facts it is virtually indistinguishable; indeed in many ways the husband's case was weaker since the wife had not denied him intercourse completely.

In this case the emphasis was not placed on the intention of the wife (as in *Scotcher*), but on the effect on the husband; there does not seem to have been any desire by the wife to drive the husband away—rather the contrary. It is true that the justices held that 'the wife was not genuinely prepared to cohabit with the husband again', but both they and the Divisional Court seem to have regarded 'genuine cohabitation' as implying full sexual intercourse rather than sharing a home. In fact they appear to have considered the conduct of the wife as something in the nature of cruelty.

This prompts the question whether medical evidence may not

⁶⁵ (1945), 109 J.P. 241. Cf. the 'malicious refusal' of the Scottish cases.

⁶⁶ [1948] 1 All E.R. 188 (Merriman, P., and Barnard, J.).

be helpful in such cases, and whether it may not even be possible to proceed on the grounds of cruelty, defined in *Russell v. Russell*,⁶⁷ as conduct causing injury or danger of injury to body or health. May not a complete denial of sexual intercourse, or an insistence on contraceptive precautions when the other party desires children, cause injury or at least danger of injury to health?

In this connection the writer is indebted to Professor Alexander Kennedy, of the Department of Psychological Medicine in the University of Durham, for the following statement of the problem and of his opinion on it :—

Given that a marriage in which one or other partner refuses intercourse without the use of contraceptives is to be regarded as having been consummated and that it is not possible for the aggrieved partner to obtain a decree of nullity;

Given that when a marriage has been normally consummated and one partner from some epoch in the marriage onwards completely refuses intercourse this does not make the refusing partner guilty of desertion if the other elects to leave him or her;

the question is :

- (a) Whether after normal consummation of the marriage refusal of intercourse can cause injury or danger of injury to body or health;
- (b) Whether if intercourse is allowed but only on condition that contraceptives are used this can have a similar effect :
 - (1) in the male,
 - (2) in the female.

I imagine there would be, as there always are, numerous shades of opinion among psychiatrists, but I think the following is a representative view :

- (a) That in the absence of any evidence on examination of the partner who has suffered the refusal, of disturbance of mind reasonably attributable to the refusal, it would be difficult to make a case on purely theoretical grounds, *i.e.*, it is doubtful whether many psychiatrists would commit themselves on the subject of 'danger of injury' alone. If a condition such as an anxiety state were found on examination a psychiatrist would be willing to give evidence to the effect that this anxiety had been either caused or aggravated by refusal of intercourse if the circumstances of the individual case appeared to point to it.
- (b) The question here is firstly whether the anxiety which may be associated with the use of contraceptives renders intercourse less satisfactory on the one hand or whether the impossibility of having children can itself cause mental ill-health. It will of course depend on the individual case, but I have no doubt that in some

⁶⁷ [1897] A.C. 395.

individuals a case could be made out for either. With a woman the bearing of children can be regarded as a natural fulfilment of her instincts and ambitions which if frustrated might be expected to produce psychological disturbance. If such psychological disturbance can be shown to be present there is surely then a case for the partner's conduct having caused injury to body or health (including mental health).

I am sure that psychiatric evidence could only be given in a case of this sort in the light of the actual clinical findings and where it was reasonable to suppose that the psychological abnormalities discovered on examination were attributable to the refusal.

This opinion makes it clear that it cannot be automatically assumed that refusal of intercourse, total or conditional, will have an effect on the other's health, but that it is quite likely to do so. If it is possible to proceed on the ground of cruelty this will, of course, have the advantage of removing the three years' delay⁶⁸ essential for desertion. On the other hand, the suit is more likely to be defended, and defended bitterly. Unless, therefore, the medical evidence is very strong it is probably better to wait three years, particularly as in practice a lesser degree of cruelty is accepted as founding constructive desertion than is needed to found a petition on cruelty itself. In the meantime, if the wife is the wronged partner, she can apply for a maintenance order provided that she is content with a maximum of £2 per week. This step will not be open to the husband, and if he wants to clarify his position immediately, the only possibility is a petition for restitution of conjugal rights, which is also the appropriate remedy for the wife when she requires more adequate maintenance than can be awarded by the justices. The danger of such a decree is that it is sometimes stated that the respondent will sufficiently comply with it if he offers to return while still refusing sexual intercourse. This view, however, is based on *Jackson v. Jackson* and must be regarded as very doubtful in the light of the new tendency displayed in *Rice v. Rice*.⁶⁹ If the decree is not complied with the better view⁷⁰ is that this conclusively establishes desertion by the respondent.

The above pre-supposes that the injured spouse will be willing and able to leave, and under present conditions of housing shortage this may not be the case. No doubt if he owns the matrimonial home he is theoretically entitled to turn the other out, but this is a difficult right to enforce⁷¹ and is not likely to commend him to

⁶⁸ Assuming, of course, that the marriage has lasted for three years.

⁶⁹ And see *Wily v. W.*, [1918] P. 1, and *Lacey v. L.*, 47 T.L.R. 577.

⁷⁰ Rayden, p. 74; Halsbury, Vol. 10, p. 665; Latey, p. 163.

⁷¹ Cf. *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; *Stewart v. Stewart*, *ibid.*, 813.

the court, particularly if the other has nowhere to go. It is also true that it is possible to have a state of desertion although both parties have remained under the same roof,⁷² but only under conditions so unpleasant that no reasonable being would voluntarily submit himself to them.

This problem became of quite frequent occurrence with husbands in the Services during the later years of the war. The husband returned from leave; his wife treated him coldly and refused him intercourse; he suspected that there was another man but he had no evidence and the wife denied it (she was in possession of the matrimonial home and her marriage allowance, and had no wish to bring matters to a head). In these circumstances the Legal Aid Service of one overseas theatre used to advise the husband to insist on intercourse, using no more force than was necessary to achieve it. The likely result of this would be to cause the wife to leave and—if the husband's suspicions were well founded—to join her lover. This drastic assertion of his rights is not likely to appeal to the husband of average sensitivity, and it is not suggested that it should be advised otherwise than in exceptional circumstances. In the last resort, however, it may be the only course. If the husband exercises care it can hardly prejudice his position; he is within his rights and the wife cannot complain. The danger is, of course, that it will lead to violence on both sides and if proceedings result it will be his word against hers. In any event the husband should certainly take contraceptive precautions, for though it may sometimes be reasonable to force her to have intercourse, it can never be reasonable to make her run the risk of bearing an unwanted child.

One further point has to be noted on which there is as yet no authority. We have seen that a refusal of intercourse except with contraceptives is not a matrimonial offence, but what is the position if the husband insists on having intercourse with contraceptives and the wife refuses unless he does not use them? It is submitted that unless there are good reasons (physical or economic) for the husband's insistence, the wife will unquestionably be within her rights. If, as a result, the marriage is never consummated, then, as has already been suggested, a petition by the wife for nullity should be successful. If the marriage has been consummated then, in the light of *Weatherley v. Weatherley*, it can hardly be argued that this alone will constitute a matrimonial offence, but it may lead to desertion or cruelty by the husband. It is considered that if the husband carried his insistence to the lengths of having connection by force this would unquestionably be cruelty.

Before concluding there is one final word to be said. Hitherto we have dealt only with legal remedies and ignored reconciliation. But where the marriage has foundered in circumstances such as

⁷² *Wanbon v. Wanbon*, [1946] 1 All E.R. 366; *Angel v. Angel*, *ibid.*, 635.

these that we have been considering the chances of effecting a reconciliation should not be ignored. If, for example, the wife has refused her husband intercourse this may be due to the fact that she no longer has any affection for him and she may even have transferred her affection to another. If so, things have gone too far and the only course is to consider, as this article has tried to do, what rights the husband has. On the other hand, the refusal may be based on some psychological disturbance,⁷³ as was not uncommon where spouses were re-united after long separations during the war. Such cases seem peculiarly suited to marriage guidance under a qualified psychiatrist and lawyers should not forget their moral duty to advise resort to such guidance. If it fails they can then consider legal action; if it succeeds then they will have two grateful clients and later, perhaps, some more of a younger generation.

To sum up :

1. Although some of the reasons advanced in favour of *Baxter v. Baxter* are unsound, the decision, that the use of contraceptives does not prevent consummation, is right and not contrary to public policy as has been suggested.

2. The same cannot be said of *Weatherley v. Weatherley*. This decision establishes that the refusal of sexual intercourse, either completely or unless contraceptives are used, is not a matrimonial offence.

3. The effect of this decision is likely to be restricted within narrow limits and if the spouse who is refused intercourse can show something more than a mere refusal of intercourse he may succeed in establishing desertion.

4. Desertion will be established if the party who is refused normal intercourse leaves the matrimonial home or induces the other to leave and can prove

(a) that the other intended to cause a separation, or

(b) that the conduct of the other was such as to make it unreasonable for cohabitation to continue.

5. In establishing 4 (b) medical evidence may be useful and may even justify a petition on the ground of cruelty.

L. C. B. GOWER.

⁷³ Cf. *Beevor v. Beevor*, *supra*.

SOURCES OF LAW IN GERMANY

THIS article will be more than a year out of date by the time it appears in print and cannot, therefore, purport to be a reliable statement of the situation as it now is. I spent a year in Germany ending on July 31, 1946, and I propose to describe some of the problems which I encountered. I do not know whether all of these problems still exist or whether any of them have been solved; I do know, however, that new problems have arisen—for instance, the Länder have been given some degree of legislative power of their own and I gather that a certain amount of alarm and despondency in the Legal Division of the C.C.G. has arisen therefrom. But even if I am out of date, my experiences may be of some interest since they show the kind of difficulties that arise out of the occupation of Germany and are likely, in my opinion, to go on arising.

Military Government throws a flood of light upon the difference between theory and practice. In the urgency of the occasion all sorts of things get done without any particular regard to the precise authority under which they are done, and not infrequently the law has to be rigged up afterwards to fit the facts. The question then arises: Where is the law to come from? and we at once find ourselves in the field which has been so well watered by the tears of students of jurisprudence. For such a student the situation will appear, according to his temperament, at the worst as a nightmare and at the best as a sort of crossword puzzle.

I was drawn with some reluctance into this study by the nature of my job. I was in command of a small branch of the Legal Division which, from the theoretical point of view, was of huge importance, since we were concerned (among other things) with the re-shaping of the system of government in the British zone at all levels from the Gemeinde to the Land. This task had been laid down for us by the Potsdam Agreement. It was one which, considered soberly, should have engaged a staff of about fifty first-class experts. I had a staff which, on paper, amounted to six and in fact, for the greater part of my time in Germany, amounted to one. I do not pretend, therefore, that our researches were profound—they were as deep as we had the time to make them. It was our business to lay down the law, which involved, in the first place, the ascertainment of the pre-existing German law, secondly, the determination of the extent to which that law was still to be deemed as being in force, and thirdly, the making of such a new law as we thought appropriate. All of these tasks

were at once fascinating and difficult, but none was more tantalising than the second, which closely resembled the Hunting of the Snark.

You start with the Declaration on the Defeat of Germany which was signed by the four Commanders-in-Chief on June 5, 1945. This, at any rate, is what I treated as the starting point. It recited that the German armed forces had unconditionally surrendered but that no government was left in Germany capable of accepting responsibility for maintaining order or for complying with the requirements of the victorious powers. It went on to say that 'the Governments of the United Kingdom, the U.S.A. and the U.S.S.R. and the Provisional Government of the French Republic hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any State, municipal or local Government or authority'. On the same day there was signed in Berlin, the Agreement on Control Machinery which provided that the supreme authority above mentioned 'will be exercised, on instructions from their Governments, by the British, U.S., Soviet and French Commanders-in-Chief, each in his own zone of occupation, and also jointly in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. . . '.

Here we have, ready made, two sources of law, one for matters affecting Germany as a whole and one for each zone. During the early part of the occupation the latter was by far the more important since the Control Council did not begin to operate effectively until the end of August, 1945. Meanwhile, many things had been done in the zones and a number of laws had been published. The most important of these, indeed, were issued as soon as the Anglo-American Forces had occupied any substantial part of German territory, that is to say, as early as September 18, 1944. It was not necessary, however, to consider the juristic basis for these laws since by Mil. Gov. Ordinance No. 4, dated July 14, 1945, 'all Military Government Proclamations, Ordinances, Laws, Notices, Regulations, and other enactments and orders and all amendments and modifications thereof issued by or under the authority of the Supreme Commander Allied Expeditionary Force and effective within the British Zone of control on July 14, 1945', were confirmed and continued in force until repealed or amended.

The language of this Ordinance plainly implies that the Supreme Commander had power to delegate his legislative functions, and this was made even clearer by Mil. Gov. Law No. 4, which established the Military Government Gazette and provided that all Proclamations, Laws, Ordinances, Notices and other regulations issued by Military Government, should be published in it, and also gave power to Military Government Headquarters in different districts within the zone, to publish their own local legislation in their own local Gazettes. The exact

extent to which subordinate military commanders could legislate for their own areas within the zone was, so far as I remember, never defined. An attempt was made to define it and I remember seeing a draft directive on the subject, but I think I am right in saying that it never got beyond a draft. Moreover, there was never in my time more than one Military Government Gazette and the idea of having local Gazettes for different districts was not followed up. Instead, local laws and proclamations issued by Military Government were published by the German officials whom we had installed at the key points of local government. This practice grew up, I suppose, simply because it was the only convenient way of working. The German people were accustomed to take orders from certain established quarters—principally the offices of the Oberpräsident and the Regierungspräsident, and the convenient way, therefore, of publishing new local legislation was through these channels.

At this point it may be convenient to describe the lay-out of Military Government. As the invading forces advanced further and further into Germany they left behind them certain Mil. Gov. Detachments whose business it was to preserve law and order and generally to administer the occupied territory. This process was picturesquely described by the Americans as 'laying the carpet'. When the boundaries of the different zones had been settled and all German resistance accounted for, the Mil. Gov. lay-out was standardised throughout the zone. It consisted of P. Dets., L/R Dets. and K. Dets. The P. Dets., of which there were four, were detachments established at the provincial Headquarters in Kiel for Province Schleswig-Holstein, Hanover for Province Hanover, Münster for Westfalen, and Düsseldorf for North Rhine Province. Immediately under the P. Dets. came the L/R Dets. representing the Länder or Regierungsbezirke. In theory, of course, the Land was the highest unit of German administration below the Reich itself, the Province a sub-division of the Land, and the Regierungsbezirk a sub-division of the Province; but the freaks of history had turned all this upside down, and although the British Zone contained three complete Länder and only part of Land Prussia, the Prussian part amounted to something like seven-eighths of the territory and the Länder of Oldenburg, Braunschweig and Lippe were only about the same size as the average Regierungsbezirk of a Prussian Province. For the purposes of Military Government, therefore, it was found convenient to treat these small Länder as equivalent to Regierungsbezirke, hence the formation of the L/R Dets. Below the L/R Dets. were the K. Dets. representing the urban and rural districts (Stadtkreise and Landkreise), and when I first arrived in Germany it was really the K. Det. Commanders who were administering the country. Each of these had a small staff of subordinate officers and they all had to turn their hands to anything. There was not, as a rule, any legal officer at K. Det.

level and the theory was that any question of law which could not be dealt with by the K. Det. was referred to the L/R Det. which had a legal staff of its own. If the problem were of sufficient magnitude it would be referred up from the L/R Det. to the P. Det. which had, of course, a higher-powered legal staff. Finally, if the P. Det. needed legal guidance it referred the problem to the Legal Division at the Headquarters of the Control Commission. But although there was always a lot of paper passing through these channels, many of the questions which confronted the K. Det. Commanders could not wait for an answer and were dealt with by them in the light of their own common sense. From what I saw of them, these K. Det. Commanders did a grand job, but it was not to be expected that they would condescend to niceties of jurisprudence or would worry very much about the juristic basis for the things they did.

One day in August, 1945, I went out to a fairly large town in Westfalen which had been badly bombed and spent a most instructive morning learning from the K. Det. Commander how he worked. At that time he was preparing for the winter. Large numbers of buildings had been utterly destroyed and a large number had been damaged beyond repair, but there was also a large number which were repairable and it was essential that these should be made weather-tight as soon as possible. The K. Det. Commander summoned the Oberbürgermeister and instructed him to make arrangements for salvaging the roofing tiles on sites where buildings had been damaged beyond repair, so that they could be used for patching up the buildings which were repairable. After a while the Oberbürgermeister reported that he was having difficulty. He said that, according to German law, the materials on the bombed sites belonged to the owners of the sites and the owners of the sites were not prepared to part with the roofing tiles for the time being since they considered (no doubt rightly) that if they held on to them until it started snowing they would get a much better price. The K. Det. Commander informed the Oberbürgermeister that he did not care twopence about the state of the German law and gave him a written authority to collect the roofing tiles in spite of it. Obviously this was the sensible thing to do and it was, in fact, being done in hundreds of instances all over the zone. At the same time, it made one wonder just where the German law stood.

Wonder was turned into bafflement by the provisions of Mil. Gov. Law No. 1, which ran as follows :

‘ABROGATION OF NAZI LAW

In order to eliminate from German law and administration within the occupied territory the policies and doctrines of the

National Socialist Party, and to restore to the German people the rule of justice and equality before the law, it is hereby ordered :

ARTICLE I

1. The following fundamental Nazi laws enacted since January 30, 1933, together with all supplementary or subsidiary carrying out laws, decrees or regulations whatsoever are hereby deprived of effect within the occupied territory :

- (a) Law for Protection of National Symbols of May 19, 1933, RGB1 1/285.
- (b) Law against the creation of Political Parties of July 14, 1933, RGB1 1/479.
- (c) Law for securing the unity of Party and State of December 1, 1933, RGB1 1/1269.
- (d) Law concerning insidious attacks against the State and the Party and for the Protection of Party Uniform of December 20, 1933, RGB1 1/1016.
- (e) Reich Flag Law of September 15, 1935, RGB1 1/1145.
- (f) Hitler Youth Law of December 1, 1936, RGB1 1/993.
- (g) Law for Protection of German Blood and Honour of September 15, 1935, RGB1 1/1146.
- (h) Decree of the Führer concerning the Legal Status of the NSDAP of December 12, 1942, RGB1 1/733.
- (j) Reich Citizenship Law of September 15, 1935, RGB1 1/1146.

2. Additional Nazi laws are and will be deprived of effect by Military Government for the purpose stated in the preamble.

ARTICLE II

General Suspending Clause

3. No German law, however or whenever enacted or enunciated, shall be applied judicially or administratively within the occupied territory in any instance where such application would cause injustice or inequality, either (a) by favouring any person because of his connection with the National Socialist Party, its formations or affiliated or supervised organisations, or (b) by discriminating against any person by reason of his race, nationality, religious beliefs or opposition to the National Socialist Party or its doctrines.'

It is reasonably plain from Article II of this Law that German law was not intended to be treated as having been repealed wholesale. It was equally plain from Article I that a certain body of German law was repealed. It was Clause 2 of Article I which gave rise to the problems. I was told by somebody who was present when this clause was drafted, that the words 'are and' which give it such a tantalising quality, were not in the original draft. When the draft was looked at, however, by an American Legal Officer concerned, he said that it was

most misleading to say that additional Nazi laws would be repealed, since they were repealing them every day in the part of Germany which they had already occupied. Hence, the addition of the words 'are and' which led to furious and fascinating argument within the Legal Division in which I participated enthusiastically.

Some said that Clause 2 merely meant that we were at liberty from time to time to publish lists of German laws, similar to the list set out in Clause 1, which would thereby be deprived of effect, but that until any particular law was so listed it would be assumed to remain in force. This construction was urged on the ground that if it were otherwise the Germans would never know where they were. I argued, on the contrary, that to read the clause in this way was to read it as though the words 'are and' had never been inserted at all. According to my view, Clause 2 had to be read in conjunction with the preamble, and the effect was that any law which embodied 'the policies and doctrines of the National Socialist Party' was automatically deprived of effect, whether it had been brought to our notice and published in a black list, or not. The fact that the Germans might not know where they stood was less important than the fact that we ourselves positively did not know; we could not be expected to put a finger on every single provision of German law which embodied the policies and doctrines of the National Socialist State, and it was up to the Germans to help us by calling attention to such provisions. This argument appeared to me to be reinforced by a Regulation made under Law No. 1 which was published in issue No. 3 of the Mil. Gov. Gazette. Part I of this Regulation set out a long list of carrying-out Laws and Decrees supplementary to the specific laws listed in Clause 1. Part II listed more than a dozen other enactments, mainly directed against Jews, which did not fall under the specific heads of Clause 1. Part II was headed 'Other enactments deprived of effect within the occupied territory under Law No. 1', and in brackets underneath this heading was written the pregnant word, 'non-exhaustive'. This I took to be a clear statement of the proposition that any particular Law could not be said to be still in force merely because it was not named in this list. The exponents of the opposite view said that this merely meant that we reserved power to add to the list from time to time, to which I answered that since we had assumed supreme authority in the British Zone we could obviously repeal any German law we chose, whether it was a Nazi law or not, and that the interpretation suggested was, therefore, superfluous.

This discussion, though amusing and sometimes heated, was in reality academic since, whoever was right in theory, we were

both partly right and partly wrong in practice. As I have mentioned already, the K. Det. Commanders carried on their administration in disregard of the existing German law whenever they felt it necessary to disregard it, and this attitude went right up through the L/R Dets. and the P. Dets. to the main Headquarters of the Control Commission, where we did not hesitate to issue directives from time to time saying that this, that or the other German law must be regarded as ineffective if it stood in the way of what we thought right.

It was all very confusing, however, since although the Legal Division was supposed to be the repository of all learning and wisdom on this subject, all sorts of things went on which the Legal Division knew nothing about until they had happened. Each of the other Divisions had made a study of the German law affecting its own particular department and each of them tended to have a number of German laws up its sleeve. For instance, although I cannot give chapter and verse for it at this distance of time, I remember that when there was some crisis in Schleswig-Holstein about the clearance of rubble, the Manpower Division fished out the *Notdienstverordnung* of 1938 whereby the *Bürgermeister* was entitled to conscript the local population for forced labour for periods of three days at a time, and it was only months after this operation had been completed that the Legal Division heard anything about it. This sort of thing was exceedingly common and it was at times difficult not to suspect that the other Divisions were deliberately keeping the Legal Division in the dark about what they were doing because they knew that if they let us know we should say that it was illegal. The principal example of this technique which came to my notice was the use by other Divisions of the German system of Administrative Fines.

This system appeared to me to exemplify in the most striking manner the difference between the German and British methods of administration. Although the distinction is showing signs of breaking down today, English law in the past has always distinguished sharply between the executive and the judicial functions of government. The function which administers the law is seldom the same as that which makes it or imposes penalties for the breach of it. Take, for instance, the police. It is their business to prevent and detect crime but it is for the courts to try and punish the offenders. Similarly, the inspectors appointed under the Factory Acts and Public Health Acts have to see that regulations are complied with, but where they find breaches of the regulations their function is limited to bringing the offending parties before the Courts of Justice. German practice had hitherto been quite different. It is common knowledge, for instance, that the police used formerly to enjoy the power of fining offenders against traffic regulations at the moment the offence was committed. This is only a minor but familiar instance. In almost every field

of German administration one found that the officials whose duty it was to administer the law also enjoyed the power of punishing persons whom they considered to have offended against it. Thus, the Inspector of Taxes was entitled under the Reichs-abgabeordnung to impose a fine, and even imprisonment up to four weeks, upon a taxpayer who failed to make proper returns or to disclose his accounts. In like manner a manager of a Labour Exchange could impose fines upon persons who failed to register. One of the most important instances was supplied by the Wirtschaftsverbände or Marketing Associations which regulated the distribution of agricultural products. These Associations had made many thousands of regulations on such subjects as the grain quotas to be delivered up by farmers and for breach of these regulations the farmer might be heavily fined (fines of ten thousand Rms. were not uncommon) on the mere *ipse dixit* of an official of the appropriate Association.

Before the Nazi regime provision was made in a good many, but by no means all, instances of administrative fining for an appeal by the party fined to some more or less impartial tribunal. These tribunals, however, were watered down practically to dissolution by Nazi legislation. It was, after all, the essence of the Führer Prinzip that in any particular field one man had the power to give orders and that his orders had to be obeyed, and it was obviously inconsistent with this principle that the matter should be argued about before Appeal Committees or Boards of Review.

It fell to my lot to lead the attack of the Legal Division upon the whole system of Administrative Fines. The trouble started with Proclamation No. 3 of the Control Council on 'Fundamental Principles of Judicial Reform'. This Proclamation, which was largely ideological hot air, laid down certain resounding maxims such as Equality before the Law, Judicial Independence and so on. Being one of the earliest instances in which the Control Council had succeeded in agreeing about anything, it was given considerable publicity even in the British press, but in fact it had little practical effect except in one important particular. It provided, among other things, that 'no person shall be deprived of life, liberty, or property without due process of law'. This classic phrase, which was, no doubt, introduced by the Americans out of a sort of feeling of home-sickness, caused me endless trouble. It was pointed out that the German system of imposing administrative fines was inconsistent with it and I was ordered to clean up every field of German law in which this practice existed. I met with the most violent opposition from other divisions of the Control Commission and particularly from Food and Agriculture. If I had had their job I should have sympathised with them. The production and distribution of food was, and still is, the most important subject in the British Zone. The farmers and

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country people, who in my time at any rate were exceedingly well fed, were reluctant to deliver the quotas which were required for the sustenance of the industrial population of the towns. The only way in which they could be made to do so was through a system of rigorous inspection and savage penalties. For this process the Food and Agriculture Division found ready to their hands the system of Administrative Fines to which the Germans were already well accustomed and which produced quick results. Quite naturally they disliked the intervention of the Legal Division with proposals for establishing (or re-establishing) an appeal machinery which was bound to make the system more cumbrous and uncertain. In this antagonism they were abetted by the Germans themselves, who positively liked the system of Administrative Fines, if only for the reason that it took place without any publicity and that a person who had been guilty of, for instance, black marketing transactions, was quite happy to take his punishment in the form of a substantial fine against which there was no appeal, rather than to have his misdemeanour made public in the Courts or Administrative Tribunals.

By the summer of 1946 the battle between the Legal and other Divisions of the Control Commission over Administrative Fines was in full swing and, on paper at any rate, Legal had scored a series of tactical successes. All the other Divisions had been induced to sign on the dotted line and had promised to take steps to see that satisfactory Appeal Tribunals would be constituted. In fact, however, very few of them had done much about it and wherever I made any close inquiry in any particular field, whether it was Food and Agriculture or Social Insurance, I found that performance had scarcely begun to compete with promise.

Another matter which was a perpetual headache to me was the question of what law-making powers were enjoyed by German authorities at different levels. The theoretical consequences of the assumption of supreme authority by the Commander-in-Chief and of his delegation of that authority to subordinate officers (including, for instance, the K. Det. Commanders and myself) had never in my time been faced in a practical manner. I do not suggest that this was anyone's fault. There was simply not the time or the staff to face them. The only practicable method of conducting Military Government was to appoint Germans who were considered to be trustworthy to the key administrative positions and tell them to get on with the job subject to such guidance as they received from us. Since they knew exactly how the German administrative machine worked and we did not, they were always about two jumps ahead of us and by the time we caught up with them it was often too late to put things right. Let me explain further. As I have already mentioned, the K. Det. Commanders worked through the Burgermeisters whom they had appointed. Similarly, the L/R Det. Commanders worked through the

Regierungspräsidenten, and the P. Det. Commanders through the Oberpräsidenten. The Oberpräsidenten, for the greater part of my time in Germany, were the highest German administrative authorities. If close attention had been paid to legal theory there would, I suppose, have been in the first place, a precise directive setting out what legal powers the Commander-in-Chief had delegated to the P. Det. Commanders, and in the second place, there would have been for each Province some precise statement showing the extent to which the P. Det. Commander had delegated his authority to the Oberpräsident. However, no such instruments of delegation existed. The nearest thing I ever saw to one was a statement published by the P. Det. Commander in the *Mitteilungs-und-Verordnungsblatt* of one of the Oberpräsidenten in December, 1945. The *Mitteilungs-und-Verordnungsblatt* was an official German publication in which the Oberpräsident gave notice to the German people of new decrees, orders and legislation in the different Provinces. In the particular issue to which I am referring, which was the first issue to be made since the establishment of Mil. Gov., the P. Det. Commander announced that he had authorised its publication in order that the local population might be informed 'of the important orders and decrees which are issued by the Provincial Administration on my orders'. The same issue contained a *Verordnung* signed by the Oberpräsident about the rationing of industrial goods. One of the clauses of this *Verordnung* conferred upon the Oberpräsident the right to inflict penalties at his own discretion. It was some time before this was brought to the notice of the P. Det. Commander by his legal staff, with the result that in February of 1946 the P. Det. Commander informed the Oberpräsident that the provisions of this clause were to be suspended, since by including it in his *Verordnung* the Oberpräsident had exceeded the authority which had been delegated to him.

This incident was only an interesting symptom of the trouble which was to blow up a little later when the Oberpräsident asked a number of searching questions as to what the extent of his delegated authority was. These questions were referred by the P. Det. to Legal Division Headquarters who were quite unable to answer them, except by saying that the P. Det. must be presumed to know what were the powers they had delegated to their Oberpräsident and that it was for them to tell Legal Division the answer and not vice versa. I drafted this reply myself and was conscious at the time that, although in theory it was the only possible reply, in practice it was rather a scurvy trick, since the question raised by the Oberpräsident showed that the whole constitutional position needed a very close examination. In discussing the subject with authorities at other P. Dets. in the zone I found that nobody really knew, or had ever defined, what the powers of the Oberpräsident were but that there was a general

unwritten understanding that he enjoyed the same powers as he had before the occupation, subject, no doubt, to the overriding power of veto by Mil. Gov. Even this understanding becomes much more like a misunderstanding when one looks at it closely, since before the Nazi regime the position of the Oberpräsident was that of the local representative in the Province of the Reich Government for the purpose of national administration only. Affairs of local self-government, on the other hand, were under the direction of the Landeshauptmann. The Nazis, however, extended the powers of the Oberpräsident to cover both fields and down-graded the Landeshauptmann to the position of a mere deputy for the Oberpräsident in matters of local self-government. If, therefore, it was suggested that the Oberpräsident was impliedly (and subject to Mil. Gov. veto) in possession of his former legislative powers, it was necessary to make up one's mind whether one meant the powers which he enjoyed before the Nazi regime or the powers which he enjoyed under it. And nobody in Mil. Gov. had done this.

But it looked as though the Oberpräsidenten had been thinking about it. The one who asked the questions I have mentioned elaborated the theme at some length. The occasion of his inquiry was Zone Policy Instruction No. 14 which had recently been issued. The object of this Instruction was to lay down the procedure for initiating legislative proposals and to differentiate between the areas of competence of the Oberpräsident, the highest German administrative authority, and the Oberlandesgerichtspräsident, the highest German judicial authority. Strictly legal subjects, such as the composition of the courts, fell within the province of the latter. Administrative subjects, such as housing and rationing, fell within the province of the former. The Instruction pointed out that proposals for legislation must only be initiated by the authority within whose competence they lay. However, the Oberpräsident seized on the word 'legislation' and asked what it meant. Just as English law has its Acts of Parliament, Orders in Council, municipal by-laws, etc., so there were formerly in Germany different grades and kinds of legislative pronouncements. The most important and respectable of these was the Gesetz—a full-blown law passed by the Reichstag or by one of the Land legislatures. But German law always went much further even than English law in providing for the making of regulations to carry out the provisions of the law. Such regulations generally appeared in the form of a Verordnung, but might also be published under other names, such as Erlass, Bekanntmachung or Bestimmung. A Gesetz nearly always ended up with a section giving power to some Minister (often the Minister des Innern) to issue decrees or regulations for the purpose of carrying out the law. Much less attention seems to have been paid in Germany than in England to the doctrine of *ultra vires*. Indeed, the Gesetz often provided that the Erlass or Verordnung of the

Minister might vary or depart from the provisions of the Gesetz 'if the intention to do so is clearly expressed'. The distinction, therefore, between a Gesetz and a Verordnung or an Erlass was never very sharp, and it was blurred almost out of recognition after the collapse of Parliamentary procedure under the Nazi regime. An Erlass of the Führer carried just as much authority as any Gesetz. During the latter years of the Nazi regime the Führer and the Reich Ministers legislated very much as the spirit moved them by the issue of Ordinances and Decrees. Their authority to do so was not challenged, and for practical purposes it made no difference under what name a particular piece of legislation appeared. (The foregoing account, which is written from memory, may not be accurate in all details, but is, broadly speaking, correct.)

When it came to dealing with Military Government, however, German officials were apt to be technical. In inquiring what was meant by 'legislation' in ZPI No. 14, the Oberpräsident intimated that he did not regard anything less than a Gesetz as legislation in the strict sense. The Minister des Innern, as the highest administrative authority under the Führer, had issued all manner of Ordinances and Decrees; but these were not 'legislation'. Since the occupation the Minister des Innern had disappeared and, by appointment of Military Government, the highest administrative authority in any given area was now the Oberpräsident. He assumed that the mantle of the Minister des Innern had thus fallen upon his shoulders, and that an Instruction as to the manner in which 'legislation' was to be initiated did not affect his power to issue a Verordnung or an Erlass.

Whether the Oberpräsident was genuinely in doubt or whether he was merely trying to bamboozle Military Government is perhaps uncertain. We instructed the P. Dets. to tell him that any pronouncement which was intended to have binding force was regarded as 'legislation', but in practice this ruling did not make very much difference since, as already mentioned, the Oberpräsidenten were always a couple of jumps ahead of Military Government. The Regierungspräsidenten were probably even further ahead since they were one degree further removed from the centre of control, and it was that much more difficult to discover what they were doing. On one occasion I found out, quite by accident, that the Regierungspräsident of Düsseldorf had issued a decree regulating the hours of opening of chemists' shops. Whether this was of great moment or not I do not know, although one could imagine that it might assume great importance in the event of an outbreak of epidemic disease. From the formal point of view, however, it was intriguing since his decree did not even purport to have been issued with the approval of Mil. Gov., but was expressed to be authorised by a Verordnung of December 21, 1939, and a Runderlass of the Minister des Innern of August 22, 1941. What authority the Regierungspräsident had to issue such

decrees since the occupation was entirely unclear. Another instance came to notice in Westfalen, where one of the Regierungspräsidenten issued (almost certainly without the authority of Mil. Gov.) a Zahlungsverbot addressed to a bank and freezing the banking account of a person against whom the administrative authorities were alleged to have a claim. This might easily have been argued to be an infringement of the 'due process' clause in Control Council Proclamation No. 3.

Decrees and notices of this sort were published in the *Mitteilungs- und-Verordnungsblatt* of the Oberpräsident, and I discovered to my alarm in the course of a visit to one of the P. Dets. that although copies of this publication were available by the hundred to the German population, only about four copies were supplied to Mil. Gov. headquarters, and not one of these ever reached the Legal Officer. At the headquarters of the Legal Division itself we never saw any of them at all.

So much for the outpouring of new law which proceeded, more or less behind our backs, from German sources of doubtful authority. As to the pre-existing German law, I always maintained that, while it was for the German courts to interpret and apply it, it was for Mil. Gov. to determine as a matter of policy whether any particular law should be regarded as being still in force. It was part of my duty to re-establish the *Verwaltungsgerichte* or administrative courts, and with this question of policy in mind I imposed a limit on their jurisdiction which read as follows:—

'(1) If and whenever the hearing of a case involves the consideration

(a) of any Law of the Reich or Land made before the 8th May, 1945, or

(b) of any act, order or direction done or given in pursuance of purported pursuance of any such Law,

and it appears doubtful whether, having regard to the proclaimed policies of Military Government or to the provisions of Military Government Law No. 1, such Law or any particular provision thereof is to be considered as remaining in force, or such act, order or direction as having been validly done or given, the Court shall hear the case fully but shall not decide the same or deliver any judgment thereon except as provided hereunder.

(2) In any such case the Court on the conclusion of the hearing shall in lieu of judgment or decision render a report to Military Government setting out:

(a) the facts of the case,

(b) the law which, in the opinion of the Court is relevant thereto, and

(c) the reasons why it appears doubtful to the Court whether such Law or any particular provision

thereof is to be considered as remaining in force or whether such act, order or direction was validly done or given.

- (3) On consideration of such report Military Government will send to the Court a written notification stating whether or to what extent or subject to what amendments such Law is to be considered as remaining in force, or such act, order or direction as having been validly done or given, and the Court will thereupon give such judgment or decision on the case before it as may be consistent with such notification."

For a long time I regarded this clause as a masterpiece of draftsmanship and as a brilliant solution of the problem presented by Clause 2 of Mil. Gov. Law No. 1. The idea of it was to make sure, on the one hand, that Mil. Gov. had the last word in deciding, as a matter of policy, whether any particular law was to be deemed as remaining in force and, on the other hand, that it was the Germans who did all the research work necessary to enable such a decision to be given. This clause was, therefore, applied wherever the *Verwaltungsgerichte* were constituted throughout the zone. It proved a complete failure. Never yet (as I am informed), and certainly never in my day, was any report of the kind envisaged made to Mil. Gov. by any of the courts. I think there were three reasons for this failure.

In the first place, this clause proved almost untranslatable into German. A number of attempts were made in Germany to produce a translation but they were all unsuccessful and the final German version was made in London. I made a practice of going through this version with the German lawyer who was to be designated as the *Präsident* of any court which I proposed to set up, and of satisfying myself that he understood it before going further. At a later stage it generally turned out that he had not understood it after all. On the whole this is not surprising since German and English lawyers are trained in different schools of thought and express themselves in an entirely different idiom. It constantly happened in connection with all sorts of subjects that translations of legal documents were misunderstood by one side or the other.

The second disadvantage of my clause was that it pre-supposed the existence of litigation before it came into play, and as a matter of fact, the Germans were not interested in litigation in the least. The subjects of interest which dwarfed all others were food, clothing and shelter. I had an interesting example of this in Berlin. Largely owing to the quadripartite administration of the city and to the behaviour of our Russian allies in particular, it was realised at an early stage that all kinds of legal irregularities were going on and for this reason it was thought desirable to establish a *Verwaltungsgericht* in the British sector of Berlin without delay. We actually established it in December, 1945 in

the commodious building of the Reichsverwaltungsgericht which happened to be in our sector and was only somewhat bomb damaged. About the end of January, 1946, I went to Berlin to inquire how the court was getting on with its business. I found that it had practically none—four or five complaints only having been filed in spite of the pomp and publicity which had been laid on for the opening ceremony. I discussed the situation with the Präsident and one of the judges in a room in the court building. Considering that it was mid-winter it was a surprisingly mild day, but the building, which had not been heated since the capture of Berlin by the Russians, was as cold as a refrigerator. We sat in our overcoats until we could take it no longer and then went out into the street where it was at least ten degrees warmer. Later on the same day I discussed the question with a highly intelligent and co-operative German legal expert who was advising the Americans. He said, 'Whatever you do, don't heat that building. If you do, the court will be flooded with litigation—people will simply go there to get warm'. However, I did manage to get the building heated and the result was precisely what he said. Within a few months the court was in arrear with its work to the extent of about one hundred and fifty cases.

But I do not believe that difficulties of translation and the necessity for keeping warm were the only reasons for the failure of my clause. I strongly suspect that German officials in general and the Oberpräsidenten in particular took care to ignore it. There is no doubt at all that cases arose which fell within it. There was the case, for instance, of the typewriter in Hamburg. Under the Reichsleistungsgesetz, certain German public authorities had power to requisition movable or immovable property for their own purposes. There is no doubt that this Gesetz was passed primarily for the benefit of the Wehrmacht and was mainly used for military requisitioning. Since the Wehrmacht had been abolished and all forms of militarism discountenanced by Mil. Gov., it was arguable that the Reichsleistungsgesetz must be deemed to have been repealed. On the other hand, the language of the Gesetz was wide enough to cover, and had in fact been used to a limited extent to cover, requisitioning by civil authorities. It was consequently arguable that to this limited extent it remained in force. When, therefore, a complaint was filed in the Hamburg Verwaltungsgericht objecting to the requisitioning of a typewriter by some local government official, the case should clearly have been dealt with as provided by my clause. However, no reference to Mil. Gov. was ever made by the court and how the case was decided I do not now remember. This was not an isolated instance because the continued validity of the Reichsleistungsgesetz had become quite a vexed question in German and British legal circles. By the summer of 1946 the argument had spread all over the zone with the result that in some places the Gesetz was considered to

be in force and in others not. When I went down to see how the Präsident of the Verwaltungsgerichte for North Rhine Province was getting on, I discovered that the question had already come to his notice. Instead of referring it to Mil. Gov. he had referred it to the Oberpräsident and he blandly informed me that the latter had ruled that the Reichsleistungsgesetz was still in force. He added by way of explanation, 'You will understand that nowadays the Oberpräsident has become our Gesetzgeber'. (I was interested to learn at the same time that the Oberpräsident had also ruled that the Notdienstverordnung was no longer in force although, as already mentioned, it had been applied in Schleswig-Holstein with the approval of the Manpower Division some months previously.)

Yet another problem which remained unsolved to the end of my time in Germany was the question how far British military officers were bound by German law. By this I do not mean to what extent they were subject to German law but rather how far they were entitled to insist upon Germans disregarding it, as in the case of the roofing tiles which I have already mentioned. There is no doubt, as a matter of practice, that so long as military operations were continuing in Germany all Germans regarded a command given by a British military officer as having the force of law. But as the conditions of the occupation became more settled and more stereotyped this proposition began to be called in question. If the Commander of a K. Det. ordered the Bürgermeister to do something it was probably no answer for the latter to say that that something would be a contravention of existing German law since the K. Det. Commander would say that it was for him to decide to what extent such German law was to be followed. But suppose that the German law invoked by the Bürgermeister had been specifically confirmed in its validity by an official pronouncement of Mil. Gov. or even of the Control Council, was it still open in such a case for a British officer to order a German official to disregard the law? I dare say that an answer to this question can be found in the books on international law but the fact remains that nobody seemed to know the answer and it is certain that British officers in uniform were among the sources of law (and at the same time of embarrassment and confusion) up to the time when I left Germany.

So far I have said very little about the highest of all sources of law, namely the Control Council itself. I have dealt with this subject at some length elsewhere (see the *National Review*, March, 1947) and will not go over the same ground again. One may summarise the matter under a few heads. In the first place the Control Council was an extremely uncertain source of law. It could make no law without the unanimous agreement of its four members. I need not enlarge upon the difficulty of getting the British, French, Americans and Russians to agree together about anything. The general result of this situation was either that the ultimate pronouncement of the Control Council was of such a vague

character as to be without any practical effect or that the issue of such a pronouncement came too late to be of any significance. Sometimes one got both results together. It was extraordinarily difficult to arrive at an agreed text in English, French and Russian of any pronouncement even when the subject matter of the text was of no importance at all. When it was important agreement became almost impossible. As an example of the technique of quadripartite legislation I may mention the law relating to the re-opening of the *Verwaltungsgerichte*. The question of passing a Control Council law on this subject was first mooted in Berlin in September, 1945, but the Russians were completely uninterested, and it would have saved a lot of trouble if no attempt to interest them had ever been made. However, after intermittent discussions over a period of months they became somewhat interested and anxious to understand the subject. The process of understanding occupied a further period of months at the end of which the Russians decided to disagree with the other allies on the question whether it was desirable to re-establish the *Verwaltungsgerichte*, or not. After a good deal of argument in Berlin we agreed to differ and I drafted a text of a Control Council law which provided for the re-establishment of the *Verwaltungsgerichte* but left their jurisdiction and procedure to the determination of the Commanders-in-Chief in their respective zones. In other words, it committed nobody to anything and indeed it was quite unrealistic at the time of its drafting since the French had already opened two *Verwaltungsgerichte* in their own zone and I opened several in our zone within the next few weeks. The draft did not emerge as a fully-fledged Control Council law until October 10, 1946. (It is Control Council Law No. 36.) By this time we had established and opened the *Verwaltungsgerichte* throughout the zone and the Control Council law had, therefore, no more than a token effect.

Control Council legislation was also uncertain in the sense that the jurisdiction of the Control Council had never been defined any more precisely than in the Agreement on Control Machinery which provided that it should have authority 'in matters affecting Germany as a whole'. Since the Russians have refused to lift the Iron Curtain it is arguable that nothing affects Germany as a whole, but even during the first year when we were still hoping for some degree of unified administration no one ever ventured to lay down what did or did not fall within these words. There were, of course, certain subjects such as de-Nazification and the disbanding of the German armed forces which were obviously of quadripartite concern and were handled in Berlin. Financial questions also, such as the rate of income tax, were considered to be matters for the Control Council rather than for the zonal authorities, but many aspects of reconstruction and administration could be dealt with more conveniently in the zone than in Berlin and those of us who worked in the zone were constantly hoping and praying that the subjects

we were concerned with would not be taken up at Control Council level, which at the best would mean months of delay and at the worst would involve making compromises with the Russians on matters about which our own views were perfectly clear. The question whether any particular subject therefore, came to be treated as one 'affecting Germany as a whole' seemed often to depend on the mere accident that the subject happened to be mentioned at some four-handed meeting in Berlin and was considered by those present as being of wide importance. Certainly, a perusal of the laws published by the Control Council does not reveal any basic principle for deciding what subjects do and what do not affect Germany as a whole. For instance, the reorganisation by the Americans of their own zone into three Länder, which took place at an early stage, was never questioned as being a matter on which they ought first to have consulted with the Allies. On the other hand I did hear a rumour just before I left that the amalgamation of North Rhine Province and Westfalen into one Land which we then had in contemplation was regarded by the Russians as a matter which ought to be submitted to quadripartite discussion. One would have thought that the rationing of electricity and gas was essentially a zonal matter. Nevertheless, the Control Council dealt with it by Law No. 7 although, like so many other Control Council laws, the effect of this law was to authorise each zone Commander to issue such regulations as he thought best, which of course would have happened whether Law No. 7 had been passed or not. Law No. 18, on the other hand, dealt in the most elaborate and detailed manner with the housing problem. This again might have been considered as a problem which could only be tackled (as, in fact, it had to be) on a local basis. Nevertheless, Law No. 18 laid down intricate procedures which very much tied the hands of those who were responsible for housing in the zones and were by no means easy to work according to the strict letter of the law.

As it turned out, therefore, in practice the Control Council as a source of law in the British Zone was less important than might have been expected. In cases where it was important it often proved highly embarrassing to the British officials who had to carry out its decisions. Their reaction was generally to go and discuss with the German authorities the best means of implementing them and the net result was to add something further to the already ill-defined area within which the Germans had been given, or had assumed, authority to legislate for themselves.

It will be seen, therefore, that the state of law in the British Zone is now quite inscrutable. There is an almost limitless field, unless one prefers to call it a jungle, open for exploration by anyone who has the knowledge, the enthusiasm and the leisure to seek out and pinpoint the sources of law which are now active. I believe that such a person is needed, but where is he to be found and who is going to pay him?

C. P. HARVEY.

REPORTS OF COMMITTEES

PARLIAMENTARY PRIVILEGE : ALLIGHAN AND WALKDEN CASES

The Allighan Case.

MR. ALLIGHAN, M.P., wrote an article in the *World's Press News* asserting that private and confidential information as to what took place at Parliamentary party meetings was conveyed by Members of Parliament present at such meetings to newspapers; that one way such information was obtained was in return for consideration paid by newspapers in the form of a retaining fee, ad hoc payment or payment in kind by personal publicity; and that another way was to obtain such information from Members under the influence of intoxicating drinks paid for by newspapers' representatives. The matter was referred to the Committee of Privileges (1947, H. C. Pap. 138), who found there was no evidence to justify the general charges. Two exceptional cases were those of Mr. Allighan himself, who had been selling reports of inter alia private party meetings to the *Evening Standard* for £30 a week, and Mr. Walkden, whose case is discussed below.

The Committee of Privileges described the Allighan case as one of great seriousness, and also of much difficulty from the point of view of the law and custom of Parliament. They pointed out that Parliament has no right to extend its privileges beyond those already recognised, though absence of an exact precedent does not in itself show that a particular matter does not come within some recognised principle of Parliamentary privilege; and that the right to punish for contempt is not restricted to cases where some actual privilege has been infringed. The House has a long-recognised right to punish as a contempt of Parliament the publication of imputations reflecting on the dignity of the House or of any Member in his capacity as such.

The novelty of this case was that the statements referred mainly to private meetings, the practice of holding which has become well established and, in the words of the Committee, 'must now be taken to form a normal and everyday incident of Parliamentary procedure without which the business of Parliament could not conveniently be conducted'. Attendance at meetings held within the precincts during a Parliamentary session is normally confined to Members as such. The Committee's conclusion on this point was that 'attendance of Members at a private party meeting held in the precincts of the Palace of Westminster during the Parliamentary session, to discuss Parliamentary matters connected with the current or future proceedings of

Parliament, is attendance in their capacity of Members of Parliament', though not all the privileges which are attached to the transactions of Parliament as a whole are attracted to such meetings. It followed that an unfounded imputation in regard to such meetings involved an affront to the House as such, and that an allegation such as that contained in the article complained of was a serious contempt. The truth of such statements is no defence, unless they are made for the purpose of calling attention to an existing abuse so that it can be remedied. After some hesitation the Committee reached the conclusion that the publication of information about secret meetings of his party by a Member involves a gross breach of confidence but is not in itself a breach of privilege; but that the making or acceptance of payment for disclosure by a Member of what takes place at such meeting is in the nature of bribery of a Member in relation to his Parliamentary work and is a breach of the privileges of the House.

The Committee concluded that (i) the publication of the general charges by Mr. Allighan constituted 'a grave contempt'; (ii) the evasive and contradictory nature of Mr. Allighan's evidence, and his indication that he considered his duty as a journalist to take precedence over his duty as a Member, amounted to 'an aggravated contempt of the House' and 'a gross breach of privilege'; and (iii) Mr. Heighway, the editor and publisher of the article, should be reprimanded.

The House, in the debate on the Committee's Report (443 H. C. Deb., 5 s., 1096-1200), did not agree that a breach of privilege was involved, but unanimously resolved that (i) in writing the article Mr. Allighan was guilty of 'a gross contempt' of the House, and (ii) in persistently misleading the Committee Mr. Allighan had committed 'a grave contempt' of the House. A third motion that Mr. Allighan, in corruptly accepting payment for disclosure of information about matters to be proceeded with in Parliament obtained from other Members under the obligation of secrecy, was guilty of 'dishonourable conduct' deserving of severe punishment as tending to destroy mutual confidence among Members and to lower the House in the estimation of the people, was carried by a majority on a free vote. The opponents of the motion argued that the House had no power to punish a Member for conduct which, though highly dishonourable, was neither a breach of privilege nor a contempt of the House. Against the fourth motion, that Mr. Allighan for his gross contempts and his misconduct should be reprimanded by the Speaker and suspended from the service of the House for six months, an amendment was carried by a majority on a free vote that he should be expelled from the House. The purpose of expulsion is remedial rather than disciplinary; as May says, it is 'not so much to punish members as to rid the House of persons who

are unfit for membership' (14th ed., p. 104). This leaves it open to the constituency to return him again if he seeks re-election, though the House would not be bound to allow him to sit if he were re-elected.

Mr. Heighway, the editor and publisher of the article, after apologising to the House, was found guilty of a gross contempt and formally reprimanded by the Speaker.

The Walkden Case.

In investigating the general charges against members made by Mr. Allighan, the Committee of Privileges were informed by Mr. Schofield (editor) and Mr. Dobson (lobby correspondent) that the *Evening News* had received a detailed account of a meeting of the Parliamentary Labour Party from a Member of Parliament to whom the paper made a weekly payment in return for information on political and industrial matters. They declined to disclose the name of the Member without his permission, which he refused to give. Mr. Walkden later informed the House that he was that Member.

The matter was then referred to the Committee of Privileges, who considered that Mr. Walkden received the weekly payment from the *Evening News* inter alia for information about matters which had come to his knowledge in confidence as a Member, and that he should have put his duty as a Member before any question of journalistic etiquette and should have disclosed his position as soon as the matter first arose. The Committee had already indicated in their Report on the Allighan case that they regarded transactions of this kind as being in the nature of bribery. They therefore concluded that 'although Mr. Walkden thought fit to betray the secrets of his party meeting for a relatively small sum, he has been guilty of a breach of Privilege'. A minority of the Committee held that he had merely committed a breach of confidence.

The House, having differed from the view of the Committee in the Allighan case as to the status of party meetings, resolved that Mr. Walkden, in corruptly accepting payment for the disclosure of information about matters to be proceeded with in Parliament obtained from other members under the obligation of secrecy, was guilty of 'dishonourable conduct'. The terms of the motion, and the arguments of its opponents, were similar to those in the third motion concerning Mr. Allighan. Mr. Walkden was then formally reprimanded by the Speaker (443 H. C. Deb., s. 5, 1200-1231).

Mr. Schofield and Mr. Dobson, of the *Evening News*, had already, two months before, been summoned to the Bar of the House and had apologised for contempt of the House in refusing to answer the Committee of Privileges when asked to disclose the name of the Member from whom they obtained information. No further action was taken against them. There seems little justification for the objection expressed by learned correspondents in *The Times* to the

summoning of these journalists to the Bar of the House before the principal matter had been discussed in the House, even though it turned out that the House did not regard Parliamentary party meetings as covered by privilege in the strict sense.

Several weeks after the debate on the *Allighan* and *Walkden Cases*, the House passed a resolution in the following form:— 'That, if in any case hereafter a member shall have been found guilty by this House of corruptly accepting payment for the disclosure and publication of confidential information about matters to be proceeded with in Parliament, any person responsible for offering such payment shall incur the grave displeasure of this House; and this House will take such action as it may, in the circumstances, think fit' (445 H.C.Deb., 5s. 1095–1159). In its original form, the motion stated that if such person was the representative of a newspaper or press agency, he and any other representative of that newspaper or press agency might be excluded from the precincts of the House until the House should otherwise determine; but the wider language was substituted as objection was raised to the specific reference to the press. The motion as passed was said to be declaratory, its purpose being to give formal notice that any persons who assisted in this way in the ruin or damage of a Member's public cause should not expect themselves to go scot free.

O. HOOD PHILLIPS.

STATUTES

THE FINANCE ACT, 1947, AND THE FINANCE (NO. 2) ACT, 1947

PERHAPS the most striking feature of the first Finance Act of 1947 is its inordinate length—well over one hundred pages—due, it is true, in part to the complexity of the subject-matter but attributable in part, it is feared, to the unfortunate tendency in recent years for the parliamentary draftsman to express in detailed words involved mathematical formulae and also to make his clauses fool-proof against the ingenuity of the ‘tax evasion’ expert, be he lawyer or accountant.

The most noteworthy alteration in the Customs and Excise provisions was a huge increase in the tobacco duty, though the Chancellor yielded to parliamentary pressure in giving relief to old-age pensioners for their own ‘smokes’ (section 3). The Treasury was given power to make orders heavily taxing imported films (section 7), thereby relieving the drain on our dollar supply, while there were minor alterations in the purchase tax provisions.

In the realm of income tax we may note increases in the earned income relief, to one-sixth with a maximum allowance of £250, and of the child allowance, which was restored to its pre-war level of £60; the effect of these reliefs should be to exempt about half a million persons from the tax this year. The remainder of the post-war credits were released to elderly people (section 16) but perhaps the most important change under this head was the new code (sections 19–23) relating to retirement and other benefits for directors and employees. These sections were the result of certain ‘tax-evasion’ schemes by which corporate bodies had provided ‘retirement’ benefits for their directors, etc., which were not in the nature of true superannuation but consisted, in one form or another, of non-taxable lump sum payments. Very broadly this code prescribes that annual payments—or the annual equivalent of lump sum payments—made by the company shall be treated as income of the employee chargeable under Schedule E. Statutory and certain other ‘approved superannuation schemes’ are exempted from the operation of the penal section (section 19). The Ninth Schedule amends the law relating to the recent ‘Double Taxation Conventions’ entered into between the United Kingdom and certain other countries, while farmers are given, at their election, a special basis of assessment for their profits arising from production herds (Tenth Schedule).

The existing law relating to the profits tax was drastically altered by Part IV of the Act which introduced a differential element into the assessment of profits by charging those which were

distributed as dividends, etc., at $12\frac{1}{2}$ per cent. instead of at the normal rate of 5 per cent.; the late Chancellor compared this differentiation, intended to encourage the ploughing back of profits into the business, with that directed at investment income, in the case of the income tax, as contrasted with earned income. The increase in the rate of tax on distributed profits was operative only from January 1, 1947—a distribution ranks as such if paid within six months of the end of the year to which it relates, otherwise at the date of payment; in order, however, to discourage specially large distributions which would attract tax only for a proportion of the year, *i.e.*, after January 1, 1947, it was enacted that any increase in dividends over the previous year should rank as a distribution for the year *in* which it was paid and not *for* which it was paid (section 35 (4)). Other noteworthy changes in this Part were the inclusion of all 'investment' income within the scope of the charge to the tax (section 32), the relieving of industrial and provident societies from the higher rate for distributions (section 41), and the total exemption from the tax of individuals and partnerships of individuals who had previously been charged at the lower rate of 4 per cent. (section 31). Finally, under the Eighth Schedule, the treatment for profits tax of certain deductions, such as allowances under the Income Tax Act, 1945, and terminal, etc., expenses for excess profits duty purposes, was co-ordinated.

The legacy and succession duties were doubled subject to certain relieving provisions detailed in Part V of the Act. Part VI, which relates to stamp duties, received perhaps undue attention both in Parliament and in the press because of a new charge thereunder in respect of the issue of bonus shares (sections 60–2); by section 61 an *ad valorem* duty of 10 per cent. was imposed on the bonus element in all securities issued after April 16, 1947. The duty was imposed on the company and not on the individual shareholder from whom collection would have been administratively impossible. The reasons given by the late Chancellor for the imposition of this new duty were that the issue of bonus shares deceived both employees and the public, as was instanced in evidence given before the Sankey Commission on the coal mines, and that the apparently reduced rate of dividends consequent thereon had harmful repercussions both on price policy and on discussions regarding the wages and conditions of employees; the issue inflated the nominal capital of a company without in any way providing new plant or machinery, increasing its efficiency or benefiting its employees. Opponents of the new duty complained that it would hamper the expansion of business and result in profits being distributed instead of ploughed back. It is too early to speak of the effect on industry of this new duty, but if a mere lawyer, rather sceptical of economic theories, may hazard a prophecy, it will have but little effect either on the efficiency or the profit-making capacity of businesses.

Other alterations in the stamp duties were the doubling of those

relating to instruments, conveyances, leases, mortgages, share warrants, etc. (sections 52-55), and the long overdue repeal or reduction of the duties on the legal profession (section 56). In conclusion it may be observed that nationalised undertakings, such as the National Coal Board, are liable both to income tax and profits tax in the same way as any other corporate body, subject, however, to inevitable minor modifications (sections 29 and 40).

The second Finance Act of 1947 was necessitated by the growing inflationary trend due to 'too much money chasing too few goods'. To drain off this superfluity of money, heavy increases in the beer duty and the purchase tax were made while the rates of profits tax were doubled throughout, both as regards 'non-distributed profits' and 'distributions' (cf. *supra*). The steady growth of gambling gave rise to the imposition of a new tax—the Pool Betting Duty (section 6 and Fifth Schedule)—which imposed a ten per cent. duty on all 'pool betting', whether by way of totalisator or coupons, but horse-racing was excluded on the ground that horse-breeding was a not unimportant source of the ever scarce dollar. The select committee on the estimates had commented in its last report on the very large sums of income tax and excess profits tax which were unpaid and, perhaps as a result thereof, section 8 of the Finance (No. 2) Act, 1947, was enacted by which interest was charged at three per cent. upon all existing arrears of these taxes as from January 1, 1948, and, as regards current and future taxes, as from three months after the due date of payment; this interest was payable 'gross' and could not be deducted in computing income for the purposes of either income tax or profits tax. The late Chancellor of the Exchequer, in introducing the second Budget, had proposed that only one-half of the cost of advertising should be allowed as a business expense but, probably owing to administrative difficulties, the proposal was dropped by his successor; the advertising industry undertook to effect the hoped-for saving by voluntary restrictions.

A. FARNSWORTH.

RECENT PERIODICAL LITERATURE

Jurisprudence. J. FRANK: Words and music: Some Remarks on Statutory Interpretation, 47 Col.L.Rev. 1259. J. COHEN: On the Teaching of 'Legislation', 47 Col.L.Rev. 1301; the author suggests that at present legal education is too much dominated by the judicial or litigation point of view; he pleads for a movement towards a sociological or 'law in action in society' orientation. 22 N.Y.U.L.Q.Rev. No. 4 is devoted to a survey of New York Law covering 1946-47; this is a very thoroughly executed work of almost 400 pages, done by a large number of contributors. G. W. WILTON: Pothier (1699-1772), 59 Jurid.Rev. 208. W. ULLMANN: The delictual responsibility of medieval corporations, 64 L.Q.R. 77. S. VESEY-FITZGERALD: The Projected Codification of Hindu Law, 29 J.Comp.Leg. 19. J. M. GANADO: Maltese Law, 29 J.Comp.Leg. 32; a short survey. A. J. LEVIN: Mr. Justice William Johnson, Jurist in Limine: the judge as historian and maker of history, 46 Mich.L.Rev. 131.

Constitutional Law. B. LASKIN: 'Peace, Order, and Good Government', re-examined, 25 Can.B.Rev. 1054; a discussion of section 91 of the British North America Act and the problem of the distribution of legislative power in Canada. *The Journal of Comparative Legislation* contains two articles on enemy legislation and judgments in liberated countries: P. DE VISSCHER: Belgium, 29 J.Comp.Leg. 46; K. JANSMA: Netherlands, 29 J.Comp.Leg. 53.

Administrative Law. F. A. BALLARD: Federal Regulation of Aviation, 60 Harv.L.Rev. 1235.

Family Law. C. A. MONTGOMERY: Ninety Years of Progress, 59 Jurid. Rev. 173; the author traces the development of the legislation concerning matrimonial causes and married women. C. E. A. BEDWELL: The Family in Medical Practice and in English Law, 15 *Medico-Legal Journal* 160. D. TOLSTOY: Variation of Marriage Settlements After Divorce or Nullity, 12 Conv.(N.S.) 112.

Law of Property. J. F. GARNER: Statutory Conveyances, 12 Conv.(N.S.) 92; the author examines conveyances effected by Statutes such as the Electricity Act, 1947. E. O. WALFORD: The Duration of Licences, 12 Conv.(N.S.) 121. B. B. BENAS: The Nature of Fraud on a Power in the Contemplation of Equity, 12 Conv.(N.S.) 106. D. TOLSTOY: see Family Law. E. A. S. BROOKS: A Survey of Progress Towards Payment of War Damage Compensation in Europe, 1 Internat.L.Q. 301.

Law of Contract. H. W. R. WADE: What is a Licence? 64 L.Q.R. 57; the author maintains that licences are *iura in personam* and not *iura in rem*; their revocability or otherwise, therefore, depends on the terms of the agreement creating them. P. H. WINFIELD: Equity and Quasi-Contract, 64 L.Q.R. 46; this is a discussion of cases or rather situations in which Equity will order repayment or grant other relief on grounds similar to those on which the Common Law gives a remedy on the basis of quasi-contract. *The Journal of Comparative Legislation* continues in vol. 29 its series on 'The treatment of "frustration of contract" in foreign legal systems'; A. L. CORBIN: American law, p. 1; M. M. AGARKOV: Soviet law, 9; E. J. COUTURE: Uruguayan law, 13; J. P. AZEVEDO: Latin-American law, 15.

Law of Tort. A. R. BROWN: The Liability of Joint Wrongdoers—the rule of the last chance to avoid, 59 Jurid.Rev. 185. H. W. R. WADE: see Law of Contract.

Mercantile Law. Law and Contemporary Problems, vol. 12, No. 4 (Autumn 1947) contains a symposium on the patent system. D. M. DICKSON: The Effect

of Joint Bank Accounts, 25 Can.B.Rev. 1101. F. A. BALLARD: see Administrative Law.

Industrial Law. W. A. ROBSON: Nationalised Industries and Industrial Law, 2 Industrial L.Rev. 192. M. W. THOMAS: Health and Safety, 2 Industrial L.Rev. 200; this is a chapter from the author's book 'The Early Factory Legislation' which is now in the press.

Law of Evidence. M. L. ROSENZWEIG: The Law of Wire Tapping (2), 33 Cornell L.Q. 73. H. A. HAMMELMANN: Rules of Evidence Under The New Italian Civil Codes, 29 J.Comp.Leg. 39.

Criminal Law and Procedure. C. G. L. DUCANN: Reforms in Criminal Judicature, 15 Medico-Legal Journal 147. Sir N. EAST: Psychiatry and Degrees of Murder, 15 Medico-Legal Journal 170.

International Law. J. N. HAZARD: The Soviet Union and a World Bill of Rights, 47 Col.L.Rev. 1095. E. A. S. BROOKS: see Law of Property. H. LAUTERPACHT: The Subjects of the Law of Nations (II), 64 L.Q.R. 97; this is an examination of the position of individuals. F. A. MANN: The Legal Status of Germany, 1 Internat.L.Q. 314. C. BILSEL: The Turkish Straits in the Light of Recent Turkish-Russian Correspondence, 41 Am.J.Int.L. 727. C. A. FRALEIGH: Compensation for War Damage to American Property in Allied Countries, 41 Am.J.Int.L. 748. F. B. SCHICK: The Nuremberg Trial and the International Law of the Future, 41 Am.J.Int.L. 770. A. E. RADO: Czechoslovak Nationalisation Decrees: some international aspects, 41 Am.J.Int.L. 795. E. PLISCHKE: Denazification Law and Procedure, 41 Am.J.Int.L. 807. J. L. KUNZ: Privileges and Immunities of International Organisations, 41 Am.J.Int.L. 828. F. B. SCHICK: The Nuremberg Trial and the Development of an International Criminal Law, 59 Jurid.Rev. 192.

W. A. STEINER.

NOTES OF CASES

DEFINITION OF CHARITY—BENEFIT TO THE COMMUNITY

In *National Anti-Vivisection Society v. I.R.C.*, [1947] 2 All E.R. 217, the House of Lords rejected the claim of the Society to be exempt from income tax as being 'a body of persons established for charitable purposes only', within the meaning of the Income Tax Act, 1918, s. 37 (1) (b).

Lord Simonds, in moving that the Society's claim fail since its aims did not from the evidence appear to be for the public benefit, strongly disapproved the words of Chitty, J., in *Re Foveaux*, [1895] 2 Ch.D. 507 : 'The (Society's) intention is to benefit the community; whether, if they achieved their object, the community would in fact be benefited is a question on which I think the court is not required to express an opinion'.

The significance of the present case cannot be over-estimated. It is laid down authoritatively that the intention of the founder of a society or trust to benefit the community is not a sufficient test as to whether a valid charity is created. The court must decide itself, by weighing the evidence, whether a society is likely to benefit the community or not. This question, moreover, is the vital one; by it every intended charity stands or falls, and the fact that it can be categorised under one of the four headings laid down by Lord Macnaghten in *Pemsel's Case*, [1891] A.C. 531, so far from being conclusive, merely raises a presumption that the objects are for the benefit of the community and therefore charitable unless the contrary is shown. Thus the ultimate test of a charity is an objective one.

Lord Wright, who moved dismissal of the appeal on the same grounds, went so far as to weigh up the pros and cons of the Society's activities, and decided that the material benefits likely to accrue to mankind from the practice of vivisection far outweighed the 'vague and problematical moral elevation' which was the Society's ultimate purpose. As Lord Wright states the evidence, the case is clear; nevertheless one can easily imagine cases in which the courts would be called upon to weigh material against spiritual benefits in circumstances where the balance is so even that one would be in danger of basing one's judgment on acceptance or refusal of a materialist philosophy. One can also visualise the converse case : a society claiming to be a charity because it benefits the community's physical welfare, while at the same time its moral effects are likely to be disastrous. It seems quite safe to say, moreover, that our moral sensibilities change from one generation

to the next, so that the 'vague moral elevation' of the present may be considered, in fifty years' time, an invaluable ethical advantage.

The other question arising out of this case was the one how far a society's purposes can be said to be political because it aims at introducing new legislation, not necessarily of a political nature. In his dissenting judgment, Lord Porter distinguished *Bowman's Case*, [1917] A.C. 406, from the present. The test, he said, is whether legislation is the substance of the society's purpose, or only the form; that is to say, whether the society desires legislation simply as one of several means to achieve its ultimate object, or whether that object is itself legislation. This distinction appears reasonable, especially in view of the fact that innumerable charitable bodies in the past have worked hard to introduce new Bills as part of their programme. The improvement of working conditions in factories was surely a charitable object, whether achieved by legislation or by the education of public opinion. The majority of the House, however, held that the Society was formed for a political purpose, as its intention to repeal and re-enact the Cruelty to Animals Act, 1876, was clearly its main purpose, and not, as Lord Porter thought, one means among several of achieving the ultimate purpose of alleviating the sufferings of animals. These two views are not irreconcilable, for it may be argued that the disagreement is on a question of fact only, viz., whether the repeal of the Act was the Society's main object or only an ancillary object. But, on the other hand, it is difficult to draw clear distinctions between ends and means, and in any case the majority did not state a rule which could be relied on for future cases. The law on this point remains in a somewhat unsatisfactory state. An 'Enabling Act' is permissible; on the other hand, a society whose sole object is a new Act cannot be a charity under any circumstances. Between these two propositions lies a wilderness through which the path is difficult to follow.

D. C. POTTER.

Ius Quaesitum Tertio

THE recent case of *Re Miller's Agreement*, *Uniacke v. Att.-Gen.*, [1947] 2 All E.R. 78, involved a deed under which N., the senior partner of a certain firm, sold his partnership interest to M. and V. As a term of the sale, M. and V. covenanted with N. to pay annuities to N.'s three daughters as from the date of N.'s death; adding that they charged all their respective interests in the profits and assets of the partnership firm with payment of the annuities.

On the death of N., the Estate Duty Office claimed estate and succession duty in respect of these annuities. The crucial issue in regard to either duty was stated by Wynn-Parry, J., to be, whether the daughters obtained a 'beneficial interest' under the deed after

N.'s decease, *viz.*, 'such an interest in property as would be protected in a court of law or equity'. It was held that no interest of the kind had vested in them. Consequently, their annuities were not burdened with succession or estate duty.

The grounds for the decision threw into relief two matters of legal importance which merit some fuller discussion, namely: (1) the waning influence in cases of this type of the doctrine of the trust of a contractual chose in action, and (2) the operation of the Law of Property Act, 1925, s. 56, in the field of personal property.¹

(1) In the present case it was agreed without argument by court and counsel that the deed created no implied trust in favour of N.'s daughters. Just a few comments need be made.² The light handling of this point is of a piece with the general judicial attitude that we find today when the impact of the trust concept upon third party contracts is under consideration. The doctrine of the trust of a contractual chose in action seems to have been incapable of being founded on any clear-cut legal basis³; it is perhaps more accurately regarded as an instrument of legal reform when in the hands of zealous judges. But this remedial movement of equity's has been sharply checked by Lord Wright's speech in the *Vandepitte Case*; and, since then, the flanking attack on the *ius quaesitum tertio* doctrine appears to be petering out.⁴ The need has arrived for the direct assault proposed by the Law Revision Committee.⁵

(2) To express trite knowledge, the doctrine labelled *ius quaesitum tertio* contains the fundamental common law principle that, where A contracts with B for the benefit of C, a third party, C derives therefrom no right to sue upon the contract. Against this principle land law presented two large exceptions: covenants in a lease that 'touch and concern the land', and restrictive covenants.⁶

Keeping this fact in mind, we see that before 1845 a highly technical distinction was taken between the effect of an indenture on the one hand, and a deed poll on the other. The indenture, unlike the deed poll, was trammelled by the rule that where a deed was made *inter partes* no person could maintain an action on the

¹ 'Real property' and 'realty' are used to include leaseholds. 'Personalty' and 'personal property' exclude leaseholds.

² This topic is exhaustively treated in Corbin's 'Contracts for the Benefit of Third Persons', 46 L.Q.R. (1930) 12, and G. L. Williams' 'Contracts for Third Parties', 7 M.L.R. (1944) 123.

³ The judicial statements thereon represent attitudes rather than workable principles in this context; *e.g.*, *Royal Exchange Assurance v. Hope*, [1928] Ch. at 185 (*per* Tomlin, J.), Lord Wright in *Vandepitte's Case*, [1933] A.C. 79, 80; and again, Lord Greene, M.R., in *Re Schebsman*, [1944] Ch. at 89.

⁴ The alleged trust has apparently been upheld in only two cases since 1932: *Harmer v. Armstrong*, [1934] Ch. 65 (C.A.), and *Re Gordon*, [1940] Ch. 851.

⁵ Sixth Interim Report (Cmd. 5449), at 30.

⁶ Strictly speaking, today the lease-covenants form the sole exception. Since *Luker v. Dennis* (1877), a restrictive covenant gives rise to an equitable interest in favour of the covenantee (etc.), so that such covenants are founded now in the law of property rather than in the law of contract.

deed who was not a party to it. So far as land was concerned, indentures were, in this respect, equated with deeds poll by the Real Property Act, 1845, s. 5, which was re-enacted in an augmented form by section 56 of the Law of Property Act, 1925; section 56 (1) provides that:

'A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument'.

These two enactments have enabled the courts to widen the class of third parties who may be benefited by land covenants,⁷ but subject to similar test conditions as they apply in the case of those leasehold and restrictive covenants which confer a benefit upon third parties without the intervention of R.P.A., s. 5, or L.P.A., s. 56 (1). This is to say, a person may sue on a covenant 'over or respecting land' contained in a deed *inter partes*, although he is not a party to the deed, provided:

- (a) he is in existence at the date of the deed⁸; and
- (b) he is a person to or with whom a grant or conveyance was purported to be made⁹; and
- (c) the covenant is one of which the benefit is capable of running with the land intended to be protected (*sed quære*).¹⁰

In short, the judges have used section 5 and section 56 to develop pre-existing institutions of the land law, following the original pattern in the extensions so far made. The sections have been productive of no radical change in the substantive law of real property.

Similarly, no radical alteration has been effected in the realm of personal property; though a reform of some substance may possibly

⁷ *Forster v. Elvet Colliery Co.*, [1908] 1 K.B. 629, affirmed in H.L., *sub nom. Dyson v. Foster*, [1908] A.C. 98 (leasehold covenant); *Re Ecclesiastical Commissioners for England's Conveyance*, [1936] Ch. 430 (restrictive covenant).

⁸ See Elphinstone, *Covenants Affecting Land* (1946), at 21, 22, nn. 1 and 2.

⁹ *White v. Bijou Mansions, Ltd.*, [1937] Ch. 624, 625 (Simonds, J.), and [1938] Ch. 365 (in the C.A.), and succeeding cases.

¹⁰ *Pro*: the C.A. in *Forster v. Elvet Colliery Co.*, *supra*; *Westhoughton U.D.C. v. Wigan Coal and Iron Co.*, [1919] 1 Ch. at 170, 175 (*per* Swinfen Eady, M.R., and Duke, L.J.); the C.A. in *Grant v. Edmondson*, [1931] 1 Ch. 1; *Wolstenholme and Cherry's Statutes*, I, 323.

Contra: *Dyson v. Foster*, [1909] A.C. at 102 (*per* Lord Macnaghten); *Re Ecclesiastical Commissioners of England's Conveyance*, [1936] Ch. at 438 (*per* Luxmoore, J.); *Halsbury's Statutes*, XV, 236; *Bailey*, 6 C.L.J. at 346; *Finlay's thesis on The Influence of Equitable Ideas concerning Property and the Development of the Law of Contract*, at 203 *et seq.*; *Cheshire, Modern Real Property* (5th ed.) at 310, 311; *Hanbury, Modern Equity* (4th ed.) at 453. *Theobald, Law of Land* (2nd ed.) at 289, is non-committal; similarly, *Elphinstone, op. cit.* at 22, n. 3. The latter author adds that 'a restrictive covenant affecting land would be valid under s. 56 as between the original covenantor and covenantee, even though the benefit of the covenant could not run with any land of the covenantee'. But, surely, the reason is that in such a case the question of the covenant running with the land is quite irrelevant; for the learned author is simply postulating the elementary fact that a promisee can sue on a promise made in his favour under seal.

have occurred—suppose in the case under review M. and V. had, in their deed with N., covenanted *with N.'s daughters* to pay them the annuities: then, plainly, on failure by M. and V. to pay, the daughters would have had an action for breach of a promise made with them under seal. Might they have sued thus before 1926? Such sparse authority as there is¹¹ makes it extremely doubtful whether the 'indenture rule' ever applied to personalty as well as realty. If it did, section 56 brings something new; otherwise, it is submitted that, in the light of the authorities so far reported, the instant section has effected and can effect no change at all in the law of personal property.

The relevant authorities are *Re Sinclair's Life Policy*,¹² *Re Foster*¹³ and the present case. In *Sinclair's Case*, an endowment policy was taken out on the applicant's life for the benefit of his godson, to mature in seventeen years, premium being payable subject to certain terms not important for our immediate purpose. Mr. Justice Farwell held that the godson acquired no interest or right to sue under the policy by reason of section 56. His observations in point are of the utmost significance: 'It is quite obvious', said the learned judge, 'that that section, if it were read quite literally, would have an over-reaching effect which was never the intention, and could not have been the intention, of the Legislature'. Therefore, '... a reasonable construction must be put upon this section'. Then follows the nucleus of the matter: 'This section ... cannot give him a beneficial title to the policy moneys, *if apart from the section he has no such title*'.¹⁴ Now, with regard to personalty, the *ius quaesitum tertio* principle has always been stringently enforced. Individual, limited, statutory exceptions have been introduced,¹⁵ and the trust concept has often been invoked, though with fluctuating success. But, apart from this, personalty law knows no parallel to the land covenants discussed above which might offer a starting-point for the effective application of section 56. Hypothetical cases embodying third party covenants analogous to the land covenants break none the less upon the barrier of the *ius quaesitum tertio* doctrine.¹⁶ Accordingly, Farwell, J.'s words amount to this, that in the case of third party contracts and

¹¹ The cases of *Cooker v. Child* (1674), 2 Lev. 74, and *Green v. Horne* (1695), 1 Salk. 197, appear to suggest that the rule relating to indentures did govern personalty, or, at any rate, extended beyond cases involving realty only. On the other hand, see *White v. Bijou Mansions, Ltd.*, [1937] Ch. at 625. Also *Finlay, op. cit.*, at 199.

¹² [1938] Ch. 799.

¹³ [1938] 3 All E.R. 357.

¹⁴ *Op. cit.* at 804, 805.

¹⁵ Listed, for example, in L.R.C., Sixth Interim Report, at 25, 26.

¹⁶ For instance (a) B buys a ship from A, a fleet-owner, and takes a covenant from A to the effect that A will not fish for herring in competition with B nor for mackerel in competition with C. C may not sue on the contract.

(b) B buys a car from A and undertakes for the first twelve months to let C have the hire of it. C has no action on the contract.

covenants relating to personalty, section 56 has no power to confer any interest (or right to sue) on the third party. If the latter happens to have acquired an interest by the operation of the trust doctrine or statutory exceptions aforementioned, the section merely blesses the interest thus obtained. The section only affirms, it cannot initiate the accomplished fact; in brief, section 56 is, in this regard, a superfluity.

The judgment of Crossman, J., in *Foster's Case*,¹⁷ underlines this interpretation, which receives forceful reaffirmation in the case under review. After marshalling and considering all the important preceding authorities, Wynn-Parry, J., concludes (at p. 82): 'It will thus be seen that there exists a considerable body of judicial opinion showing that the courts have been constrained to limit the scope of the section. I think it emerges from these cases that the section has the effect, not of creating rights, but only of assisting the protection of rights shown to exist'. A criticism must, with respect, be interpolated, for it is profoundly difficult to perceive what additional protection section 56 can ever afford to existent third party rights—unless (which is highly improbable) the learned judge is referring to the 'indenture rule'.

If section 56 intended a legal revolution, it has misfired, in the opinion of the High Court. In theory, the issue lies open to the adjudication of the Court of Appeal and House of Lords. But the very fact that the L.R.C. needed to make the comments and recommendations it did¹⁸ serves as a fairly reliable pointer to the contemporaneous judicial viewpoint in this matter. Certainly, the suggestion¹⁹ that so sweeping a legal reform may have been effectuated in this vague, hole-and-corner manner places upon the section a truly unreasonable, not to say, impossible construction. The High Court decisions, it is respectfully submitted, appear to be entirely consonant with principle.

C. GRUNFELD.

RESTORATION OF PRE-WAR TRADE PRACTICE. EFFECT ON 'EARNING CAPACITY'

DECISIONS on the Workmen's Compensation Act are somewhat in the nature of an epilogue to a chapter in the history of labour law which is about to come to an end. This is particularly true of cases which deal with loss of earning capacity. Under the Workmen's Compensation Act, 1925, s. 9 (3), a workman whose pre-accident earnings amounted to more than 50s. a week receives, in a case of partial incapacity, one-half of the difference between his average pre-accident earnings 'and the average weekly amount

¹⁷ Especially, *op. cit.* at 365.

¹⁸ *Op. cit.*, 25 *et seq.*

¹⁹ Cp. Hanbury, *Modern Equity* (4th ed.) at 148.

which he is earning or is able to earn in some suitable employment or business after the accident'. The meaning of the words 'is earning or is able to earn' has presented the courts with a number of intricate problems, but also with an opportunity of elucidating some matters of general interest which will retain their importance when, under the National Insurance (Industrial Injuries) Act, 1946, loss of earning capacity will have ceased to be the standard of measurement of the injured workman's rights and will have been replaced by other criteria such as the extent of his disablement and of his personal needs.

The main difficulty involved in the interpretation of the 'partial incapacity' provision of the Workmen's Compensation Act is this: If the workman's average earnings at any time subsequent to the accident fall short of his pre-accident wages, is he entitled to receive by way of compensation one-half of the difference although the fall in wages may have been entirely or partly the result of the development of the general labour market? And conversely: can he claim more than one-half of the difference between his wages *tunc* and his wages *nunc* if he can show that, but for a general rise in the level of wages, his earnings would have been even less?

As a result of the decision of the House of Lords in *Delta Mill* (1919), *Ltd. v. Blakemore* (1935), 104 L.J.K.B. 459; as interpreted by the Court of Appeal in *Sharplin v. W. B. Bawn & Co. Ltd.*, [1947] 1 All E.R. 436, it is now clear that the workman's earnings have to be taken into account such as they are. It would be wrong to try to eliminate those factors which originate in general developments such as longer or shorter hours, changes in wage rates, etc. To do so would be equivalent to a refusal to give effect to the words 'is earning' in the statute and to treat the Act of 1925 as if it made ability to earn the sole test of loss of capacity, while in fact, illogically perhaps but nevertheless deliberately, actual earnings have been made the primary yardstick and ability to earn comes in only in those cases in which the workman intentionally omits to make use of his earning capacity.

In *Sharplin's Case* the fall in wages was due to 'the reduction of working hours consequent on the winding-up of war contracts'. In *Plater v. Consett Iron Co., Ltd.*, [1947] 2 All E.R. 460, the Court of Appeal was faced with the problem whether the restoration of a pre-war trade practice and the return of a 'dilutee' to what Evershed, L.J., called his 'substantive position' was also one of those general economic developments which had to be ignored under the principle of the *Sharplin Case*. A man who had never been trained or apprenticed so as to 'entitle him to the status of a fitter' (the word 'status' occurs in the judgment of Tucker, L.J.) and whose pre-war occupation was that of a fitter's mate, suffered an accident during the war while working and

being paid as a fitter under the dilution agreement of February 10, 1941, between the Iron and Steel Employers' Association and the Amalgamated Engineering Union. The nature of the injury was such that the man, after a period of initial total incapacity, was able to resume work as a fitter. But when, in February 1946, he was 'down-graded' again and reverted from his 'acting' to his 'substantive' rank, it appeared that he was incapable of doing the work of a mate so that he was employed as a general labourer. The Court of Appeal held that he was entitled to 50 per cent. of the difference between his wages as a fitter and those now received by him as a labourer. The restoration of the pre-war trade practice and the downgrading of the workman was, like the dilution agreement itself and the consequential upgrading, 'a process which took place in the economic sphere . . . a phase in the economic position of the labour market . . . an incident in the ups and downs of the labour market (*per* Tucker, L.J.). Dilution and restoration are functions of the labour market as much as a rise and fall in wages.

The general interest of this decision lies in its treatment of collective bargaining and of legislation relevant thereto. The court had been reminded of the existence of the Restoration of Pre-War Trade Practices Act, 1942, of which Tucker, L.J., said that it gave 'legislative force' to agreements such as the AEU dilution agreement of February, 1941. However that may be, the court held that it was irrelevant whether the employer in restoring the pre-war practice had acted in fulfilment of a 'legal' obligation under that Act. 'It would have been the duty of the employers and the workman to abide by the agreement which had been entered into whether or not this Act of Parliament had been passed' (*per* Tucker, L.J.). Somervell, L.J., was prepared to 'assume' that the employers, when fixing the date for the restoration of the pre-war practice, had been carrying out their obligation under the Act. The decision then results in this: that a duty imposed on individual workmen and employers to carry out collective agreements is recognised, irrespective of the existence of legal sanctions. The case will therefore retain its importance when the problem of measuring loss of earning capacity will have ceased to exist.

O. KAHN-FREUND.

JOINT TORTFEASORS—ACCORD AND SATISFACTION—COVENANT
NOT TO SUE

THE Court of Appeal in confirming the decision of Mr. Justice Evershed in *Apley Estates v. De Bernales* (1947), 63 T.L.R. 72, has also once more confirmed that the Law Reform (Married Women and Tortfeasors) Act, 1935, has left the rule in *Duck v.*

Mayeu, [1892] 2 Q.B. 511, undisturbed. According to this rule a distinction is made between a release and an agreement not to sue. A creditor who agrees to release one of several joint tortfeasors thereby grants a discharge to all. A creditor who merely agrees not to sue one of the joint tortfeasors does not release the others and retains in being their joint liability. The argument on which this strange distinction is based in *Duck v. Mayeu* is a plain case of nineteenth century '*Begriffsjurisprudenz*' as is witnessed by the following words of A. L. Smith, L.J., quoted with approval in *Apley Estates v. De Bernales* by Morton, L.J.:

It is, we think clear law, that a release granted to one joint tortfeasor or to one joint debtor, operates as a discharge of the other joint tortfeasor or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. . . . It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor.

The 'one and indivisible cause of action' is nothing else but the '*una obligatio*' of the Pandectist theory on 'correal obligations', though it must be said that, notwithstanding all their cobweb of conceptions, the Pandectists were practical enough to see that it did not fit the case of joint tortfeasors, which they therefore considered as a mere 'solidary obligation'. Spanish law is today the only Continental legal system that agrees with the rule of *Duck v. Mayeu* (see art. 1143, Cod. Civ.). In all the other modern legal systems the question whether the release of one joint debtor or tortfeasor releases the others is one to be decided in accordance with the intention of the parties. The older Codes, such as the French Code Civil (art. 1285) and the Dutch Civil Code (art. 1476) still retain a presumption that a release of all the joint debtors is contemplated, but the more modern Codes such as the German (section 423) and the Swiss Code (art. 147 (2)) have abandoned this point of view and the Indian Contract Act has adopted what appears to be today the view most likely to represent the actual intention of the parties, *i.e.*, that if nothing about the point has been agreed upon between the parties all other joint debtors or tortfeasors will remain bound (art. 44).

It may be objected that a creditor who has released one of the joint debtors has inflicted thereby harm upon the other joint debtors or tortfeasors in that he has deprived them of the possibility of obtaining contribution from the debtor or tortfeasor who has been released (see, *e.g.*, the Scottish case of *Smith v. Harding* (1877), 5 R. 147), but the obvious answer to this is, of course, that no agreement between the creditor and one of the debtors can possibly prejudice any right that any one of the other debtors may have for a contribution from the debtor with whom the agreement has been made.

In *Apley Estates Company v. De Bernales*, Morton, L.J., rightly stated that the rule in *Duck v. Mayeu* had 'often operated hardship'. He added that he was not prepared to extend it in any way. These remarks throw a significant light upon the limits of the possibility of development under a case law system. Roman law and South African law (Voet 45.2.5, Lee, Commentary on Grotius, p. 242) have retained the old solution, now generally considered obsolete. The modern Continental laws have—although not everywhere in the same degree—replaced it by one that is universally agreed to be in every respect more just and more reasonable.

E. J. COHN.

SUCCESSION TO IMMOVABLES ABROAD

THE sixth Duke of Wellington, who was also Duke of Ciudad Rodrigo in Spain, was the owner of certain real estate and movable property situate in Spain. He made a will in May, 1942, which would appear to have been in the English form, but valid by the law of Spain and by which he gave his Spanish property to 'the person who . . . will on my decease become Duke of Wellington and Ciudad Rodrigo'. In December, 1942, he made another will whereby he gave his estate other than that disposed of by the will of May, 1942, to trustees upon trust 'for the person who upon my death shall become Duke of Wellington'. On the death of the sixth Duke in 1943 his uncle, Gerald, succeeded to the dukedom of Wellington, but the dukedom of Ciudad Rodrigo became vested in his sister. Consequently, there occurred a separation between the two dukedoms and the question arose what effect was to be attributed to the testator's first will which obviously contemplated a gift to a person holding both dukedoms. From the point of view of English law Wynn-Parry, J., and, affirming him in a very short judgment, the Court of Appeal (Lord Greene, M.R., Cohen and Asquith, L.J.J.) had no difficulty in deciding that the gift contained in the first will failed because there existed no person fulfilling the qualification of holding both dukedoms, but that the Spanish estate passed under the second will to the seventh Duke as part of the testator's residuary estate rather than as a separate estate to those entitled on an intestacy; that, in other words, the matter had to be dealt with as if the first will did not exist and the second applied to the whole of the testator's property : [1947] 2 All E.R. 854.

The remarkable point about the decision does not lie in its result, but in the method by which this was reached. Wynn-Parry, J., started from the question by what law succession to the immovable property situate in Spain was to be determined. He continued : 'According to English law the devolution of the immovable property situated in Spain comprised in the [first] will is to be

governed by Spanish law as the *lex situs*'. Having referred to the well-known cases relating to *renvoi* he proceeded to turn to the question what law a Spanish court would apply, *i.e.*, the *lex patriae* or the *lex situs*, and whether a Spanish court would recognise and apply the doctrine of *renvoi*. He was thus led to a very long discussion of Spanish law—a discussion which was a little distasteful to the learned judge on account of 'a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction'. In the result he held that acceptance of the *renvoi* which English law makes to Spanish law as the *lex situs* would be 'against the spirit and intendment of the Spanish Civil Code' and that 'according to Spanish law the questions raised . . . as to the devolution of the immovable property in Spain of the testator must be resolved by reference to English law'. (The learned judge thus followed the evidence of an expert witness who had relied on writings by Professor Trias de Bes—a Spanish expert on the Conflict of Laws according to whom, however, Spanish law recognises and accepts the doctrine of *renvoi*: *Hague Recueil*, 81 (1930) 663–665.)

Apart from the fact that this, it is believed, is the first case in which the Court of Appeal approved of what has come to be known as the 'foreign court theory' of *renvoi*, and that the decision vividly illustrates the practical difficulties in the application of this theory, the judgments do not enunciate any new principles that would require to be noted. One cannot help wondering, however, why the court thought it necessary to travel by so circuitous and onerous a road and whether it could not, and perhaps ought not to, have adopted a less cumbersome solution.

The questions for decision were : (1) What was the effect of the gift in the first will, that is to say, did it fail or was there, as was contended on behalf of interested persons, a gift to the seventh Duke and the testator's sister as joint tenants? (2) If the gift failed, was there an intestacy in regard to the Spanish immovables or a gift of residue under the second will? The Court thus had to ascertain whether and, if so, in whose favour the testator had *by his will* disposed of his Spanish property. This, it is suggested, did not involve a question of title or devolution or of incidents of an estate within the meaning of the rule according to which succession to immovables is governed by the *lex situs*, but made it incumbent to construe the terms of the two wills—a task in fact undertaken by Wynn-Parry, J., after he had found that he was not required to apply Spanish municipal law. Since the wills were made by a domiciled Englishman in the English language and, obviously, with English law in mind, the court could and, maybe, should have followed the principles laid down in such cases as *Studd v. Cook* (1888), 8 App.Cas. 577, and explained by Dicey (–Keith), 5th ed., p. 603, and, particularly, Professor Cheshire, *Private International Law*, 3rd ed., pp. 735 *seq.* They would have led to the direct

application of English law as the law of the testator's domicile and as that intended by him for the purpose of interpreting his testamentary dispositions, and would not have required any reference to Spanish law at all.

In no event would it be justifiable to draw from the decision the conclusion that a will relating to immovable and movable property situate both here and abroad is necessarily subject to foreign law in all matters affecting the determination of the person entitled to the foreign land. The court cannot have intended to derogate from the words of Lord Fitzgerald in *Studd v. Cook*, *ubi supra*, at p. 605, according to which the will of a domiciled Englishman, made in England in the English language, is to be interpreted according to English law except only that 'so far as it deals with immovable property in Scotland *its application and the rights of the persons claiming under it are determined by the lex rei sitae*'. The determination of the claimants is a matter which is covered by the rule, not the exception.

F. A. MANN.

REVIEWS

THE PROVINCE AND FUNCTION OF LAW. By JULIUS STONE, Professor of Jurisprudence and International Law in the University of Sydney. (Sydney: Associated General Publications Pty. Ltd. London: Stevens & Sons, Ltd. 1947. lxiv and 918 pp. £3 10s.)

AFTER a long period of barrenness, the last few years have witnessed an astonishing revival of jurisprudential thought within the British Commonwealth of Nations. Among a number of recent attempts to re-define the end and function of law in modern society, Professor Stone's work, originally published in Australia, is the most comprehensive and ambitious. That many of his conclusions have been reached independently by other jurisprudential works published in recent years, only proves the irresistible impact of the social problems of our times on legal thought. It does not detract from the importance of a work which ranges far and wide over the fields of analytical jurisprudence as well as legal theory and sociology. Its references to modern legal and sociological literature as well as to practical legal problems and court decisions are astonishing in scope and comprehensiveness. *The Province and Function of Law* is a book of a legal scholar whose interests range far beyond the law. Yet it is, in the author's own words, an interlocutory work—a challenge to further thought and enquiry rather than a final profession. It is a book which, in width of conception and breadth of learning, must be judged by the highest critical standards. It is in this spirit that the following reflections on the achievements as well as the deficiencies of Professor Stone's monumental treatise are offered.

In the introductory part the author attempts a re-definition of the province of jurisprudence. After searching examination of the hundreds of classifications and definitions offered by scores of jurists of all nations, he suggests a re-definition of jurisprudence in three main branches: analytical jurisprudence, sociological (or functional) jurisprudence, and theories of justice (or ethical jurisprudence). It is a division with which most modern teachers of jurisprudence will agree, and it is practically identical with the classification adopted by Professor Hall in his *Readings in Jurisprudence* (1938). The book follows this pattern. The three main parts are concerned with Law and Logic, Law and Justice, and Law and Society. In the first part the foundations of analytical jurisprudence are examined against a study of three major writers: Austin, Roguin and Kelsen. The inclusion of a critique of Hohfeld's classification of legal conceptions is not easy to understand in the frame-work of the present book. It develops into an examination of certain aspects of analytical jurisprudence, but the book is otherwise not much concerned with analytical jurisprudence and concepts of law. (There is no discussion, for example, of the nature of crime, of corporate personality and many other problems of analytical jurisprudence. The singling out of this particular aspect of analytical jurisprudence, while highly stimulating and valuable in itself, seems hardly relevant to the main pattern of the book. The last section in this part is concerned with the limitation of logical reasoning and law, and in this connection deals with the examination of extra-logical and crypto-idealistic elements in judicial reasoning. This part contains a brilliant analysis of the various syllogistic methods by which, under the appearance of logical certainty, the law is moulded in one direction or another, particularly in the development of English common law. To the present reviewer it would have appeared preferable to defer the discussion of this fascinating problem

to a later part of the book: that is, following and not preceding the analysis of legal theories, social interests and other idealistic elements influencing the development of the law. As the book is arranged, the reader has some difficulty in getting a coherent account of Professor Stone's view on the creative element in the judicial process. Both logical and ideological analysis is dispersed over the three parts.

The second part is, in the main, an account of the principal movements in legal theory studied generally against the background of an outstanding representative of a school of legal thought. In the present reviewer's opinion, the different chapters in this part are of uneven value. The chapter on Bentham is outstanding in clarity and constructively links Bentham's achievement to the problems of our own times. On the other hand, the account of the legal philosophies of Kant and Hegel is weak and colourless. This is probably due to one of the few weaknesses in Professor Stone's encyclopædic mental equipment: his neglect of the philosophic foundations without which the older theories of justice are unintelligible. Like the whole book, this part abounds in brilliant insights and an understanding of essentials above superficial differences of legal systems and forms of expression. Thus, Stammeler's social idealism—which measures just law by a fictitious 'special community'—is brought into relation with Lord Atkin's 'neighbour' test in *Donoghue v. Stevenson*. In the present reviewer's opinion it is regrettable that the modern sociological theories of law, such as the theories of Géný, Ehrlich and Pound are separated both from each other and from the chapter on Law and Justice. This seems to destroy the organic connection between the thought of Bentham, Mill, Ihering and the modern theories centred around an appraisal and balance of interest.

Professor Stone is a disciple of Roscoe Pound, whose influence is paramount throughout the book. The most brilliant part of the book is devoted to the analysis of law as an adjustment of conflicting interests which is based on Pound's approach and classification. The different claims of individual and social interests are surveyed and illustrated by a wealth of practical detail and suggestions for further research. At the same time Professor Stone does not uncritically adopt the teaching of his master. His criticism of Pound's three-fold division of legally protected interests into individual, public and social interests is convincing. It is in this part that the guiding theme of the book, the analysis of the perpetually changing tension between law and the development of society, is most vividly demonstrated, though the separation of this part from the general trends of legal theory is to be regretted.

The third part deals with the sociology of law, and it is in this part that the present reviewer has found it most difficult to grope his way. Every modern jurist is faced with the problem that Professor Stone has tackled with a wealth of intellectual equipment and of original thought: Given the increasing connection of law and the other social sciences, how far should the modern jurist go in the discussion of sociological, economic, psychological and other problems. In the present reviewer's opinion it is not possible, not even for an author of Professor Stone's intellectual dimensions, to write a text-book on sociology or economics as an incidental part of a text-book on jurisprudence. On the other hand, the self-limitation of the analytical school is not open to the modern jurist who sees law as a process of social development. In this dilemma it is submitted the jurist cannot but accept the main conclusions which leading sociologists, economists, scientists or psychologists may have reached, and state clearly the assumptions on which he is proceeding. In an analysis of modern developments in the law of restraint of trade, for example, it is pertinent for the jurist to trace conflicting economic theories in the different judgments, to lay bare ideological valuations and conflicts underlying legal decisions; but it is neither possible nor necessary to enter at the same time into a discussion of the fundamentals of monopoly capitalism, free competition, state socialism, etc. Professor Stone has not altogether avoided this

danger. The last part contains various fragments of text-books on the sociology of power and abortive discussions on the conflict between laissez-faire theories and the advocates of planned economy. The reader is treated to extracts from Mannheim or Hayek or Bertrand Russell, followed by a more or less inconclusive discussion of their theses. The discussion is bound to be inconclusive, for the themes are immense: it is the modern jurist's dilemma that the fields which he ought to master widen continuously while his own craft becomes more and more specialised and complex. It is all the more important not to get lost in the wilderness. For an analysis, for example, of the dual aspect of law as a form of power and as an expression of socio-ethical convictions, it would not appear to be necessary to enter into a detailed analysis of the different forms and functions of power in the modern state.

Professor Stone is a relativist: that is, he sees law as an expression of changing values and conflicting interests. He is therefore bound to reject any absolute theories of justice. He is not, however, entirely free from the weakness which permeates Pound's later work, where, contrary to the whole trend of his teaching, he attempts to prove certain absolute ideas of justice. Both in his *Contemporary Juristic Theory* and in *Social Control through Law*, Pound attacks the relativists whom he describes as 'give-it-up' philosophers. As far as one can judge he throws such thinkers as Max Weber and Radbruch into one pot with Kelsen, failing to see that the relativism of the former two is not an escape from a choice of values but a clear and trenchant exposition of the conflict of values which permeates all social life. This is entirely in accord with Roscoe Pound's own main teaching, and it is not surprising therefore that his recent attempts to construe absolute values of justice on the basis of his own theory are so unconvincing. Ultimately he must take refuge in such phrases as 'The legal order cannot stand still until philosophers can agree . . . on an idea . . .'. In the meantime the courts must, as in the past, go on finding out by experience and developing by reason the modes of adjusting relations and ordering conduct which will give the most effect to the whole scheme of interests with the least friction and the least waste'. It is impossible to derive much guidance from such a formula. The ordering of legal relations between monopolistic organisation of employers and labour, for example, avoids friction and waste, but sacrifices other social values. Which of the two prevails is a matter of choice between utilitarian collectivists or individual values.¹ Professor Stone is far more cautious in his search for an absolute ideal of justice, but he appears to find one in what he calls a 'minimum standard for all as a generally agreed basic end'. Whether this is an absolute ideal of justice or the condensation of the predominant trends of thought in our time does not become clear. Even as an idea for our own times such a formula is almost meaningless. As Professor Stone himself is well aware it settles nothing in the controversy between planners and individualists, capitalists and socialists.

On some of the more specifically juristic problems on which Professor Stone's preliminary analysis is so penetrating, one looks in vain for definite conclusions. What, for example, are the factors guiding the judge in the development of law? Professor Stone's exposition of the fallacies in logical reasoning could not be surpassed, but nowhere does he analyse clearly the conflict between the need for judges to adapt the interpretation of law to changing social ideas and the need to keep law and politics distinct. The conflict is apparent in the recent decisions of the House of Lords (for example, in its attitude to common employment) as much as in the judicial interpretations of the American or Australian Constitutions. One would have liked to find in this book a re-assessment of the problems analysed by such great judges as Holmes or Cardozo in the light of recent events and developments.

¹ All these antinomies have been traced with masterful lucidity and consistency by Radbruch, the complete omission of whose legal philosophy is a deplorable gap in Professor Stone's work.

In the present reviewer's opinion, unity, conclusiveness and readability of the book have suffered, to some extent, from digression into fields not strictly relevant to its main theme and from a sometimes bewildering abundance of references and citations. The impression left is that of a vast structure of which parts have been completed but others have been barely sketched out, while others again seem to detract from the main plan and outline. But all these are criticisms apposite only to a work of unusual greatness of conception and depth of learning. *The Province and Function of Law* is undoubtedly not a students' book, but it will be impossible for anyone to think and work on the place of law in society without constant consultation of Professor Stone's treatise: as an encyclopædic work of reference, as a stimulus to thought, and as a limitless source of further search and enquiry into the functions of law.

W. FRIEDMANN.

STUDIES IN AFRICAN NATIVE LAW. By JULIUS LEWIN. (Cape Town: The African Bookman. 1947.)

THIS book contains a number of essays on the sociological aspects of native law in South Africa. Its author, who is an Advocate of the Supreme Court of South Africa, has as his main purpose the relation of customary practices to the changing conditions of Bantu society and to the common law of the land.

This is an important task. The native inhabitants of the Union are already much under the influence of European culture, and the background of native law today is not simply the tribal system, but the more complicated social and economic system in which the natives now find themselves.

Lewin shows that one of the commonest causes of action seems to arise from the sort of transactions and the forms of relationship which natives have adopted from Europeans, and which reflect the economic realities underlying their lives. Such cases concern money lent, goods sold, services rendered, possession or ownership claimed of an article, etc., etc. He also cites a number of cases, to exemplify the conflict between native law and common law, the implications of which are that where a cause of action is known to common law but not to native custom the plaintiff may fail. A European involved in a similar situation, as plaintiff, could obtain damages under the common law, but there is no legal redress available to the black man because the common law does not apply in his case.

The problem, as a whole, is complicated for a number of reasons. In the first place, although a substantial body of native law exists which is fairly explicit, little attempt has been made to codify it. It is essentially family or personal law covering such matters as marriage and divorce, settlement of dowry, seduction, illegitimacy and adoption of children, inheritance, etc. European law, on the other hand, is the foundation on which constitutional government rests. It has also supplied the law of crime, of commerce, of property, and of procedure. Whether native law can be reconciled to the latter and is capable of development to meet the new circumstances of modern African life is a doubtful question. What is even more important, as Lewin pertinently observes, is whether its development is desirable on lines different from or parallel to the European law.

In the reviewer's opinion the answer to such questions must depend upon developments in the wider sociological field. It is impossible to offer a simple solution. The situation in countries like South Africa and the East African Colonies which maintain a segregationist policy, is clearly different from other regions in Africa where a steady and relatively unhindered assimilation of European ways and institutions is taking place. In the latter case it is

possible, to a large extent, to envisage a progressive adaptation to and adoption of European legal principles and procedures. For example, one interesting development in family law that the reviewer has noticed in West Africa is the increasing willingness of the native court to give prior recognition to the claim of the eldest son to his father's estate, as against the traditional rights of the deceased's brother.

Changes of this kind are taking place despite the fact that, as Lewin rightly points out, the British are—almost unconsciously, it seems—trying to build up a system of native law with material supplied from below rather than above. There is little doubt about the trend, but its detection and proper appreciation often require careful investigation.

All together, for students interested in the legal as well as the sociological implications of colonial conditions, this is a most stimulating and well-documented book.

K. L. LITTLE.

STUDIES IN BIBLICAL LAW. By Dr. DAVID DAUBE. (Cambridge University Press. 1947. 328 pp. 21s. net.)

THIS book will interest both Bible students and lawyers and that rarer person—a combination of both. It is written with freshness, lucidity and challenge. Although Hebrew words and phrases necessarily appear, these are no hindrance and are fully translated. There are five studies—'Law in the Narratives', 'Codes and Codas', 'Lex Talionis', 'Communal Responsibility', 'Summum Jus, Summa Injuria'.

In the first essay we meet with a mild challenge. It is to the famous dictum of Sir Henry Maine that 'law was not always distinguished from religion' and that 'all precepts were deemed to be first of all of religious character'. Dr. Daube demurs though he does not accept the 'somewhat harsh' statement of Dr. A. S. Diamond that 'there is no substance in any of these conclusions'. Dr. Daube bids us be cautious. He takes the Biblical narratives to show that parts of ancient Hebrew law can be reconstructed apart from religion. He makes a 'case' out of the story say of Joseph, or Moses, or Abraham. And he deals with them generally in a comparative way. For example, he refers to the story of Moses being given sight of the Promised Land and asks whether it was possible in ancient Hebrew law or at least Hebrew legal thought, *as it was in Roman*, to obtain possession 'by sight and intention' 'seize land by looking at it'.

It is in this combination of modest challenge and comparison that much of the value of the book lies.

Undoubtedly Dr. Daube has an eye for resemblances. He does not show the same eye for differences, probably for want of space. For now and again it is clear that he is working in the cramped space of the size of the book as when he says, with a touch of humour, having enumerated a number of possibilities, 'Enough of this—the complications possible and even normal are many and not easy to tackle'.

Each of the chapters yields good fruit. The one on 'Communal Responsibility' bears more nearly upon our own time and condition than the others. Dr. Daube shows a discriminating trend in his insistence that 'Communal Responsibility' is other than 'Ruler Punishment'. We would have been glad to receive a longer treatment on the corresponding 'Ruler Reward' and 'Communal Merit'.

The third essay on 'Lex Talionis' is more difficult to follow, and the thesis more difficult to receive. 'The object of this study', he says, 'is to show that, even in the earliest epoch open to inquiry, the idea of compensation was important where we are inclined to notice nothing but punishment'. In this connection he puts in a defence of the Rabbinic system, and adds: 'the

Rabbinic system is the system of the Bible in that it represents and brings to full life the essential teachings of the Bible'. The whole essay shows how very easy it is to impute the Hebrew law given ideas and practices which belong to other times and peoples. Whether Dr. Daube gives the full and satisfactory interpretation may be doubted, but we must give heed when he contends that the law of retaliation is based upon the idea 'that if you deprive a man of a certain power or faculty, this power or faculty becomes yours'. He does not accept the position of Professor Jolowicz that 'ancient systems deal with tort and the damages for it not so much quantitatively as qualitatively. The penalty is made to fit, not the amount of damage inflicted by the tort but by the nature of the tort itself'. The whole chapter demands and will repay careful reading.

In these essays Dr. Daube has opened many doors. The two Indexes are admirable.

B. GREY GRIFFITH.

DUTY AND ART IN ADVOCACY. By the Hon. Sir MALCOLM HILBERY.
(London : Stevens & Sons, Ltd. 35 pp. 6s. net.)

THESE two lectures—for lectures they appear to be though the little volume throws no light on their origin—are very well worth the attention of young advocates, and indeed some established advocates might do worse than ponder, with a view to practice, the ripe wisdom which they contain. Hilbery, J., was a leading common law advocate before his elevation to the bench, and is therefore eminently qualified to give guidance on the matters with which he deals.

The first of the two lectures discusses problems of perennial interest to advocates, such as the conflict between duty to client and duty to the court and society. Although the learned judge has little new to say on this topic he puts the moral code which should govern the advocate at once clearly and unflinchingly and does not hesitate to refer to the failures in this respect of lawyers as eminent as the late Lord Birkenhead.

On the art of advocacy much has been written, but seldom has so much to the point been said in so short a space as here. The young advocate who masters these lessons will not fail for lack of knowledge as to how to handle his case.

C.

BRITISH NATIONALITY: LAW AND PRACTICE. By J. MERVYN JONES.
With a Foreword by W. E. BECKETT. (Oxford: Clarendon Press. 1947. xxii and 452 pp. 30s.)

FOR many years, the lack of a comprehensive treatise on the law of British Nationality has been sorely felt. As Mr. Beckett has pointed out (55 (1939) L.Q.R. 257, at p. 272), the application of the British Nationality Acts 'gives rise to an enormous number of most interesting questions on which there are virtually no judicial decisions. While the papers of the Foreign Office and the Home Office show the questions that have arisen and the view which has been followed administratively with regard to them, the legal profession at large remains ignorant of their existence. It would be of the greatest utility if a good book were written on this subject. . . . I believe that if any competent writer were to undertake to produce a book on British nationality on these lines, he would have the satisfaction of giving his name to what would certainly become for many years the standard work on the subject'.

It was Mr. Mervyn Jones who was fortunate enough to secure, and who was considered competent to receive, Mr. Beckett's sponsorship. Both of them are entitled to congratulations on their decision, for Mr. Mervyn Jones has filled

the gap admirably and produced an extraordinarily valuable book which is at present, and is destined to remain, the leading and indispensable authority on the subject. It is attractively written, discloses a highly trained legal mind, contains a full and illuminating discussion and altogether proves that its author possesses the requirements stipulated by Mr. Beckett in 1939.

The book is divided into five parts. Part 1 deals with the Theories and Principles of International Law regarding Nationality. Here Mr. Mervyn Jones gives in general terms a survey of some fundamental conceptions of international law: nationality, jurisdiction, allegiance, 'ressortissants', nationality of corporations, naturalisation, dual nationality, the effect of territorial changes, expatriation, the Hague Codification Conference of 1930. As the author remarks, these matters are to some extent outside the scope of his work, yet it would have done no harm if he had shown less restraint in treating them. Thus it is interesting to observe that the author doubts the existence of a rule of international law under which, in the case of annexation of territory, only those nationals of the annexed state acquire the nationality of the annexing state who either remain resident in the annexed territory or submit to the new sovereign; but the argument does not seem to be either convincing or exhaustive (see 5 (1942) *MOD. L. REV.* 218) and is perhaps too much influenced by British administrative practice.

Part 2 contains a historical introduction to the Modern law of British Nationality. Its most substantial chapter is devoted to the conception of a British subject at common law (pp. 28-73). A full discussion of Coke's report of *Calvin's Case* has, of course, pride of place, and here the reader will also find an analysis of the conception of allegiance (into the history of which, according to the author, 'much original research remains to be done'), and of the effects of territorial changes from the point of view of English law.

In Part 3 Mr. Mervyn Jones presents a detailed commentary on the British Nationality and Status of Aliens Acts, 1914-1943. This is undoubtedly the principal part of the book to which the practising lawyer will most frequently turn. Its outstanding feature is the fact that the author has had access to normally inaccessible material. Without it this part of the book could not have been written; for it is a necessary qualification of an author that he has experience of the suggestions and illustrations which actual cases provide and which no mere theorist can visualise, and that he speaks with the authority which comes from knowledge of the solutions adopted in practice. It is no wonder, therefore, that both the comments on the statutory provisions and the examples of which many, though perhaps not sufficiently many, are given, are concise, pointed and vivid. They will afford reliable and, frequently, authoritative guidance to the practitioner.

In Part 4 Mr. Mervyn Jones treats the difficult and much neglected law of British nationality within the Empire. In the preface he points out that 'the whole Commonwealth position appears somewhat fluid'. He has therefore refrained from a detailed analysis, but his survey will prove very helpful.

Part 5 deals with British protected persons of whom lawyers used to know very little until they had the benefit of Mr. Mervyn Jones' paper in *British Year Book of International Law*, 1945, 122, and the protection of British corporations. Here again the interplay of nationality laws and international law is explained with great lucidity.

The Appendices contain the texts of numerous statutes, but it would have been convenient if the full text of the Acts of 1914, 1918, 1922 and 1933 had again been printed.

In conclusion two further wishes may perhaps be mentioned so that the author may consider them for a second edition. The application of the Nationality Acts involves numerous questions of private international law. Mr. Mervyn Jones never fails to refer to them (see, *e.g.*, pp. 134, 166, 179, 192, 199), but he does so rather cursorily and it would seem that a more thorough discussion of these problems is required. This should lead the author to a reconsideration of his frequently expressed view that, *e.g.*, the word

'minor' means, in the case of a child domiciled in the United Kingdom, under the age of twenty-one, but in the case of a child domiciled elsewhere it must, under the English rules of private international law, be interpreted according to the law of the child's domicile. If the English legislator employs the phrase 'minor', is it not a reasonable inference that he speaks with his own conceptions in mind and employs the phrase as a short equivalent for 'under the age of 21'? The second observation arises from this reviewer's suspicion that a good deal of illuminating material may be found in the large body of American case law on United States citizenship and that, moreover, the interpretation of the English Acts would be enriched by an investigation of those decisions in which foreign courts have had to apply or construe them.

F. A. MANN.

THE PROBLEM OF PRE-WAR CONTRACTS IN PEACE TREATIES. By ERNST WOLFF. With a Foreword by SIR ARNOLD MCNAIR. (London: Stevens & Sons, Ltd. 1946. xii and 143 pp. 12s. 6d. net.)

THIS is a study by an eminent German legal practitioner of the contract clauses contained in the Peace Treaties of 1919 and the Treaty of Lausanne, and of their application by the Mixed Arbitral Tribunals. It was written during the late war and is designed as a guide to the problems which the framers of the new peace treaties must face. The learned author argues very forcibly in favour of the inclusion in the new treaties of provisions of greater scope and less ambiguity than those contained in Article 299 and the annex to Section 5 of the Economic Clauses of the Treaty of Versailles and the corresponding portions of the other treaties of the 1919 settlement. It is perhaps a matter for regret that the framers of the new treaties with Italy, Roumania, Bulgaria, Hungary and Finland have not listened to Dr. Wolff. For Annex XVI of the Italian Treaty, and the corresponding portions of the other new treaties, reproduce at least some of the uncertainties of the earlier situation. Provision is indeed made for the exception from the treaty regime of wartime contracts—as distinct from pre-war contracts—made with the authorisation of an Allied government. This is in accordance with Dr. Wolff's recommendations and with those of the International Law Association. But there is no class of maintained contracts as there was in the Treaty of Versailles and the ambiguity of Article 299 (a) of the latter instrument regarding the date at which a contract is dissolved is exactly reproduced. No doubt one of the reasons why the handling of the matter has not much improved since 1919 is that, as Dr. Wolff points out, business men have since that time anticipated war and thus have not been taken unawares by it as they were in 1914. The need for regulation of the matter has thus not been so great. But more detailed provisions, on the lines of those the author of this book suggests, would have been nevertheless desirable. In this connection it is perhaps to be remarked that even Dr. Wolff's scheme does not go as far as it might. For instance, he would base the test of enmity exclusively or mainly on nationality and would exclude from regulation by the peace treaties contracts with neutral subjects. Yet, where as in 1939 the true war was preceded by a 'white war', in the course of which Germany acquired and invested with her citizenship millions of Austrians and Czechs, the test of enemy nationality becomes too inclusive and the regulation by treaty of the contracts of neutrals may be most desirable for the doing of adequate justice to individuals. But the text of the new German Treaty has, of course, yet to be seen, and it may well differ from that of the Italian draft.

CLIVE PARRY

THE SCHELDT QUESTION TO 1839. By S. T. BINDOFF. (London: George Allen & Unwin, Ltd. 1945. ix and 238 pp. 10s. 6d. net.)

THOUGH we must recoil from Mr. Ford's verdict on history as a whole, we may confess that certain types of it may be intensely stale and unprofitable. This reviewer would be tempted thus to characterise, for instance, local history. Parochial annals and that county series named for Victoria—surely Albert was intended for such a *monumentum* could only be *Germanum*—emphatically do not interest him. And early diplomatic history, so unrewarding and remote as it invariably is, constitutes another pet aversion. Let there be added to these prejudices a deep suspicion of all Dutch history engendered by a former incautious reliance upon Motley and a thoroughly biased reception awaits such a book as Mr. Bindoff's. But the latter is a quite remarkable production and a full recantation is in progress.

This book is a fascinating study of an aspect of legal and economic history to which not much attention has hitherto been paid. In the author's own words, it is an account of the influence upon history of three facts: that since the end of the fifteenth century Antwerp has been actually or potentially one of Europe's greatest seaports; that since 1585 (with one short interval) a political frontier has separated that port from the mouth of the Scheldt on which it lies; and that Holland, the interposed state, was long dominated by economic interests to a great extent hostile to those of Antwerp. But there have really been two 'Scheldt Questions': that of the period before the Dutch closure of the river in 1585, and the later and more familiar one of the long closure and of the ultimate establishment of the regime of 1839. Perhaps the earlier one, which was likewise a question of the politico-economic control of the river, is the more interesting. For it serves to provide a picture of feudalism as complete and as vivid as that reflected in the history of English land law. But it is feudalism with a difference, feudalism completely divorced from lands and tenures and largely from courts and jurisdictions. Yet all the same features are there, the nexus between lord and vassal, the incidents of dependence, though represented now not by aids and services but by *geleiden* and by tolls. There is even a parallel to *Quia Emptores* in the Emperor Maximilian's requirement that the magistrates of Antwerp should nominate a 'man living and dying' to represent them, upon whose death they should pay a relief, when in 1479 he allowed the commutation of tolls into an annual rent. The account of the feudal regime of the river thus furnishes a striking justification for the economic interpretation of early English land law and deserves, as indeed does the whole book, to be widely read.

CLIVE PARRY

THE ELEMENTS OF ROMAN LAW, with a translation of the Institutes of Justinian. By R. W. LEE, D.C.L., F.B.A. Reprinted with corrections, 1946. (London: Sweet & Maxwell, Ltd. xxiii and 489 pp.)

IT is a relief that this book is again in print, and we only hope this will still be true when this review appears. As was generally forecast when it was first published, it has proved itself in practice the best that can be recommended to beginners, and, though the reviewer still wishes Professor Lee had written a rather different type of book, re-reading has only enhanced his appreciation of what has in fact been written. There are no major changes. Here and there a paragraph has been re-written, generally to make it clearer, and a few references have been added to new books, e.g., Dr. Schulz's *History of Roman Legal Science* and Professor de Zulueta's *Roman Law of Sale*. One of the latter alters the translation of Justinian's provisions with respect to the

formalities required for written contracts of sale (p. 302), but the general interpretation of those provisions has not been changed. The author says that it is a question of fact in each case whether the parties intend to be bound independently of the writing or not until their agreement has been put into writing. This was no doubt the rule before Justinian, and it has often been held that his constitution did not make a change, but the prevalent opinion, and that which the student will find both in Buckland and de Zulueta, is different. It might have saved some perplexity if it had been mentioned. Professor Lee has also added a reference to the Giessen papyrus in connection with the *Constitutio Antonina* (p. 53), but he seems to remain sceptical as to its value, and, in view of the amount of textual emendation to which it has been subjected, he is well within his rights.

H. F. JOLOWICZ.

A SHORT OUTLINE OF ENGLISH LEGAL HISTORY. By HAROLD POTTER, LL.D. Fourth edition, revised and enlarged. (London: Sweet & Maxwell, Ltd. 1945. xvi and 256 pp. 17s. 6d. net.)

'LITTLE POTTER' must be almost as well known to generations of students as 'Little Hunter' once was. It is, as the learned author is careful to point out, a different work from the greater Potter though both have a common source. But it is open to the same objection—pointed out in a striking review of the longer work by Mr. R. F. Treharne which appeared in these pages in November, 1944—that 'legal history too often snatches some single fact from its historical context, attaches to it a significance which the lay historian does not recognise, and works it into the fabric of accepted teaching with a meaning which, to the historian, seems quite wrong'. The plain fact is that a satisfactory short legal history has yet to be written. Professor Potter, indeed, makes no claim to have attempted the task. In the preface to his third edition he expressly disclaims for his shorter book any pretensions to being an outline of the whole field. He now attempts no more—apart from the provision of a new Introduction and a new chapter on the forms of action and the partial rewriting of four others—than an enlivening of the text by the addition of a number of illustrations. But, in spite of the learned author's modesty, this must have been no inconsiderable task and it has been performed with his habitual great accuracy. What is perhaps a pity is that he should take the view that 'an "outline" can hardly be expected to rise to heights of literary style'. For surely the contemporary distaste of the student for legal history could be corrected by his introduction to it through Maitland's pages. It is said that the compression of curricula rendered necessary by the present pressure upon the law schools often will not allow of that. It is a great loss.

CLIVE PARRY

THE LAW OF WILLS. By RUPERT CROSS. (London: Stevens & Sons, Ltd. 1947. viii and 97 pp. 4s.)

LIKE the other books published in the series *This is the Law*, this work is intended primarily for the layman. It is divided into five chapters. The chapter headings are as follows:—Chapter 1, 'Why you should make a will, and what happens if you don't'; Chapter 2, 'How you make, alter and revoke a will'; Chapter 3, 'How you prove a will'; Chapter 4, 'Points to consider when making a will'; and Chapter 5, 'The winding up of an estate'.

The book is clearly written and well illustrated. It contains sound criticisms of parts of the law and gives an occasional admonition to the reader not to venture far without legal advice. Two minor criticisms may be made. In the first place there are several passages which may mislead the reader.

This is no doubt the result of trying to condense the subject-matter. For example in the first paragraph on p. 1 the first reason for making a will is 'if you want anyone other than your spouse to have any article or certain sum of money belonging to your estate after your death, you can only make sure of this by dealing with the matter in a will'. Other examples will be found on p. 7 (personal chattels to widow without transfer); pp. 19-20 (undue influence); pp. 21 and 23 (signature in the testator's presence); p. 38 (it is not stated that the widow has been appointed executrix); p. 51 (settled land). The second criticism that can be made is that some of the paragraphs could well have been omitted as too difficult for the layman to follow; for example, the last paragraph on p. 30 containing a confusing example of a special power of appointment.

D. HUGHES PARRY.

DER WANDEL DES INTERNATIONALEN KARTELLBEGRIFFS. AMERIKANISCHE KARTELLOKTRIN UND WORLD TRADE CHARTER (The Change of the International Conception of Cartel. American Cartel Doctrine and World Trade Charter). By Dr. FREDERICK HAUSSMANN, Professor of Economics, Upsala College, New Jersey. (A. Francke AG. Verlag Bern. Sfrs. 11.50. \$3.)

THE Draft Charter of the International Trade Organisation of the United Nations (published as Appendix to the Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment of September, 1947¹) includes in Chapters V and VI provisions relating to the control of international private and government cartels.² While accepting cartels as instruments of international economic co-ordination, the authors of the Charter realise that the freedom of international trade is endangered by the restraint of trade which is the very purpose and raison d'être of cartels.³ The Charter therefore attempts to create an international control of cartels in order to prevent any 'harmful effects of restrictive business practices on the expansion of production of trade and the maintenance in all countries of high levels of real income and on the other purposes of the organisation'.⁴

Even on the national scale control presents a most complex economic and legal problem. Its aim is to reconcile freedom of trade with the reasonable protection of producers and consumers against the destructive consequences of cut-throat competition. The solution will be different in different countries at different times. A cartel may serve the purpose of the expansion of trade today and may restrain production, distribution or consumption tomorrow simply because of a change in economic conditions. In the international field it is unlikely that the governments concerned would easily agree in their appraisal of the economic effects of particular cartel practices. A cartel may serve the expansion of trade and employment in one country and may be harmful to production or export trade in another.

A mere undertaking of all members of the Organisation 'to take all possible steps within their jurisdiction to prevent restrictive practices having harmful

¹ Cmd. 7212. At the time of writing the International Conference on Trade and Employment has been in session at Havana for over two months.

² An analysis of these provisions is given in 'International Cartels' by F. E. Koch in *The Modern Law Review* of April, 1946.

³ See 'Cartels as Instruments of International Economic Organisation' by F. E. Koch in *The Modern Law Review* of July, 1945, p. 131.

⁴ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October, 1946, p. 18, Chapter IV, Section A, 3.

effects on the purposes of the Organisation'⁵ could therefore be invalidated or remain without practical value because some members might allow or approve of a monopolistic arrangement or restrictive practice and therefore refrain from controlling action while others might regard such practice as injurious to the aims of the Charter.

This difficulty would be aggravated as long as there exists no uniformity of view between the members of the Organisation as to their fundamental attitude to cartels. 'In preliminary exchanges' it was found that some delegates regarded these practices as invariant and automatic barriers to a free and expanding system of international trade . . . on the other hand some delegates perceived considerable advantages in their wise use, particularly in introducing stability in industries requiring large investment and depending mainly on external markets'.⁶

A practicable international system of cartel control can hardly be envisaged before the members of the Organisation have reached agreement, at least on the fundamental conception of the cartel.

The recent publication of Professor Haussmann's book, which is an amplification of a lecture given by the author to the Statistical-Economic Association and the local branch of the Swiss-American Society for Cultural Relations in Basle in April, 1947, coincided with the Second Session of the Preparatory Committee for the International Trade Conference in Geneva. The mere fact of the preparatory meeting shows that the treatment of international cartel questions had reached a decisive new stage. Only after fundamental agreement on the solution of the highly complex cartel problem had been achieved was the way open for a comprehensive Charter of an International Trade Organisation now under consideration.

Professor Haussmann tries to analyse in his book how the foundations of such agreement were laid and in what ways it should be possible to erect a sound structure of international cartel policy on this basis.

Cartels which, in accordance with communis opinio and his own previous studies on concern and cartel law, Professor Haussmann defines as associations of economically independent economic units formed for the purpose of influencing markets (in contrast with trusts which further identical aims by a centralised administration of dependent economic units) may be formed between private or public commercial enterprises or between private and public commercial enterprises.⁷ They may adopt the form of gentlemen's agreements⁸ or trade associations which are limited to services of an informative nature, including those relating to prices and basic calculation factors,⁹ or they may be proper syndicates openly aiming at influencing markets and at the fixing of prices by the members of the cartel.

The attitude adopted towards cartels was by no means uniform throughout the world. On the contrary, there was a fundamental contrast between the treatment of cartels and monopolies in the United States of America, on the one hand, and in Europe, on the other.

⁵ *Ibidem*.

⁶ *Ibidem*, Sect. A, 2.

⁷ Article 44, para. 4, of the draft Charter of September, 1947.

⁸ In this connection Haussmann mentions the so-called 'Gary Dinners' of the American steel industry at which discussions on weather, family, art, travelling and other social subjects resulted in common agreement on the next year's prices.

⁹ Haussmann notes the increase in England of the number of such trade associations (from 1,900 in 1919 to 2,500 in 1947), of which many exercise a direct influence on markets. He envisages the development of the international cartel more in the form of such loose associations, conferences and meetings for friendly discussions or the exchange of technical information, and he refers in this connection to the Anglo-American Oil Agreement as a very loose new form of international understanding.

American cartel policy is based on the Sherman Act of July 2, 1890. Introduced at a time when cartels were hardly known, it declared illegal 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in inter-State or international trade'¹⁰ without any special provisions directed against cartels or special cartel measures. It was the 'magna carta' of free competition in defence against any restrictive business practices either in the form of restraint of trade or of a monopoly.

In the book under review, Professor Haussmann analyses the history of cartel and concern law in U.S.A. and traces its change from the religious fervour of the Sherman Act to the practical compromise of the American draft of the World Trade Charter of 1945.

From the beginning, the American Supreme Court was unable to ignore the inter-connection between the growing size of the American industrial enterprises which were the breeding-stock of monopolistic tendencies and restrictive business practices and the corresponding increase of the productive efficiency of American industry by the introduction of modernised production methods. The application of the anti-trust and anti-cartel laws thus became a continual compromise between legal considerations, on the one hand, and economic considerations, on the other, a compromise between the conception of the freedom of competitive trade and the prevention of social waste and instability.

The famous *Standard Oil Case* confirmed the Anglo-Saxon common law principle that only unreasonable restraints of trade were deemed illegal.¹¹ In practice, however, the 'rule of reason' was applied exclusively to trusts, amalgamations and combines. Cartels were excluded from its benefits as per se illegal, being regarded as restraints of trade by the very nature of the agreement between their members.

Except for a short interval from 1933 to 1935, when a more lenient view prevailed, and during the last war, when the necessity for a supreme productive effort overshadowed public interest in anti-monopolistic prosecutions of national enterprises, American jurisdiction and administrative practice has up to the present day rejected cartels (in contrast with monopolies) outright, and the anti-cartel attitude of the U.S.A. culminated in an ever-increasing hostility against international cartels.¹²

In contrast with American practice, most European Continental countries allowed, or even encouraged, cartels as means of reasonable private planning, and they tried, often somewhat half-heartedly, to curb monopolistic abuses by a more or less efficient control of the activities of cartels. The author accounts for the difference in the form of economic concentration in the two cases by the different economic structure and development of the two continents. Europe, in contrast to U.S.A., consists of a multitude of economically interdependent States which are highly developed only in part. Inter-State cartels in Europe to some extent replaced a European federation. They were means of overcoming the economic difficulties arising from the changed political frontiers due to the peace treaties after 1918. England, France, Germany and Switzerland¹³ also preferred the more elastic concentration of individually independent economic units by cartel understandings to the more rigid American form of concentration by trusts.

¹⁰ The Webb-Pomerene Act of April 10, 1918 (Export Trade Act), excepted export cartels between Americans from the cartel prohibition.

¹¹ See Koch, *Grundzüge des englischen Kartellrechts*, p. 14 ff.

¹² The author reproduces a letter from the President of the U.S. to the Secretary of the Department of State dated September 6, 1944, in which the President states: 'Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed. With international trade involved, this end can be achieved only through collaborative action by the United Nations'.

¹³ The author gives interesting data on the number of cartels in England, France, Germany, Switzerland, Sweden, Poland, Czechoslovakia, Hungary, Norway and Yugoslavia which bring the total number of European cartels to about 10,000.

The author shows how the provisions of the draft World Charter on International Cartel Control made an attempt to bridge the gulf between the American protagonists of free trade and the European representatives of international economic co-ordination and planning. The Americans have agreed to admit inter-governmental commodity agreements in extraordinary circumstances in order to overcome special temporary difficulties, such as the tendency 'towards persistent disequilibrium between producers and consumers of primary commodities, the accumulation of burdensome stocks and pronounced fluctuations in prices'.¹⁴ They have also accepted the application of the 'rule of reason' for cartels. Business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control shall be combated 'whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article I'.¹⁵ The British, by accepting the American proposals, have endorsed a scheme of stricter control of international cartels by the International Trade Organisation.¹⁶

The receipt and investigation of complaints about restrictive business practices are among the most important functions of the organisation, as 'it was clear to all delegates of the Preparatory Committee that governments would be unlikely to agree in their judgment of the effects of particular practices'.¹⁷

Professor Haussmann rightly welcomes these proposals as those of a fundamentally new cartel policy. International cartels are now recognised as instruments of international co-ordination, and the abuse of their economic power shall be prevented with the same firmness as the monopolistic restraints of trade under the American anti-trust law.

The question naturally arises as to whether the aforementioned concessions on either side, designed to close the gap between contrasting views on the operation of cartels, will suffice to guarantee an efficient control of international cartels or whether the 'loosely-fitting work containing all these diverse methods of national economy' will prove to be a sham at the first attempt at implementation of agreed terms of the Charter. The author realises this inherent danger¹⁸ and makes a number of proposals for a practical international cartel policy which would not affect the sovereign national cartel policy of the members of the Organisation.

In the first instance he recommends the strict adherence to the 'rule of reason'. In so far he unwittingly agrees with the guiding principles of cartel control submitted by the present reviewer in 1945 and 1946,¹⁹ and with Mason,²⁰ who hopes that 'through inter-governmental discussion a more uniform view of what constitutes an unreasonable restraint of trade may emerge'.

In agreement with Article 44, para. 2 of the Charter, Professor Haussmann

¹⁴ Article 52 of the draft Charter; see Koch in *The Modern Law Review*, 1946, pp. 68-69.

¹⁵ Article 44, para. 1, of the Charter. The change of the wording of the original Article 34 of the American draft: 'Business practices which restrain competition and which thus have the effect of . . .' to the wording of Article 44, para. 1: 'Whenever such practices have harmful effects . . .' makes it clear that restrictive business practices without such harmful effects shall be considered reasonable and allowed.

¹⁶ 'We must either devise, if we can, some loosely-fitting work within which we can contain all these diverse methods of national economy or else we have to abandon the effort to get any international agreement at all'. Sir Stafford Cripps in the House of Commons in December, 1945, as cited by Haussmann, p. 22.

¹⁷ Report of the First Session, Chapter IV, Sect. A, para. 4.

¹⁸ He refers to the unfortunate experiences of the World Economic Conference of 1927.

¹⁹ *The Modern Law Review*, 1945, p. 141, f.; 1946, p. 7.

²⁰ 'Controlling World Trade', pp. 48-49, cited from Haussmann, p. 39.

suggests that certain business or cartel practices should be looked upon as *prima facie* evidence of unreasonableness.

The registration of international cartels which the author, in agreement with my own convictions, regards as a practicable and necessary measure of control, should in his opinion constitute only a preparatory step to the international enforcement of a proper cartel control. He does not consider the individual countries concerned to be proper judges to decide whether or not a certain cartel is objectionable, and recommends instead to transfer the procedure and final decision to an international court of law whose judgments should be made enforceable by national legislation and jurisdiction.

Desirable as it certainly is to achieve an efficient cartel control by means of enforceable decisions of an international authority, it seems obvious to me that, at any rate for the time being, this suggestion is no practical proposition. 'The attitude of the various countries towards cartels forms part of their sovereign economic policy. None of them will be prepared to surrender its sovereign powers in that respect to an international court of justice deciding a most complex economic problem under a rule of law. The governments will be anxious to retain their power to decide for themselves, on economic grounds, which would be the best way to deal with a particular cartel, under the ever-changing conditions of their national economy'.²¹ We shall have to resign ourselves at the moment to a programme that 'may be sadly disappointing to the economic purist and Utopian to the cynical realist, but it comes close to the maximum combination of the ideal and the feasible'.²²

Professor Haussmann has set himself the task of bringing this maximum closer to the ideal. With the lucidity and brilliance with which we are familiar from his previous works on concern and cartel law he tries to develop a uniform international conception of the cartel out of the contrast between the two rigid American methods and the rather vague attempts of European law to stem the tide of the accumulation of economic power in the hands of big business. His treatise is well supported by an abundance of the most useful material in the form of notes, a comprehensive bibliography and a rich collection of pertinent documents, opinions and statements from leading personalities and American and English institutions on the question of cartel policy and control as well as a reproduction of the American anti-trust acts and the various drafts of the cartel provisions of the World Trade Charter and the latest international economic agreements such as the International Tea Cartel of 1938 and the Anglo-American Oil Agreement of 1944 and 1945.

The future will show in how far Professor Haussmann will be successful in his stimulating attempt to reconcile the diverging national conceptions of the cartel by the development of a uniform international conception. His book makes a most valuable contribution to the development of international cartel law in any case,²³ and it will be indispensable to all those, lawyers and economists, who have a theoretical or practical interest in the subject.

F. E. KOCH.

²¹ Koch in *The Modern Law Review*, 1946, p. 70.

²² Knorr, 'The Problem of International Cartels and Inter-Governmental Commodity Arrangements' in *Yale Law Journal*, 1946, p. 1106 ff., cited from Haussmann, p. 40.

²³ In a later article on the legal and economic importance of the new American, English and French anti-cartel acts in Germany published in the German *Monatsschrift für Deutsches Recht*, Haussmann, in co-authorship with Professor Wuerdiger, of the University of Hamburg, has expressed his hope that the compromise between the American and the Anglo-French cartel conceptions adopted in the draft World Charter will facilitate the uniform interpretation and application of the new German cartel control law enacted by the three military governments of Western Germany.

INCOME TAX CASE LAW. JUDICIAL INTERPRETATIONS OF THE
INCOME TAX ACTS. By A. FARNSWORTH, PH.D., LL.M. (Lond).
Demy 8vo. (Stevens & Sons, Ltd. 17s. 6d.)

AN income tax consciousness induced by reading this admirable little book prompts the reflection that 17s. 6d. (its published price) represents something like £1 10s. of untaxed income (and for surtax payers, Cripps alone knows what!) and a doubt whether the expenditure will qualify as 'money wholly and exclusively laid out on expenditure for the purpose of the . . . profession . . .' or will be more cruelly categorised as a sum 'expended for any other domestic or private purpose'. In short, its price must look forbidding for less than two hundred pages notwithstanding the elegant format and attire of the volume.

However, whatever privations a purchase may entail (about one hundred indifferent cigarettes), the book must be recommended to everyone upon whose professional or academic sphere the subject impinges—that is to say almost all lawyers. In a field where the literature is almost entirely unpalatable and unattractive, Dr. Farnsworth renders great service by consistently producing both here and in his erudite notes in this *Review* and the *Law Quarterly Review*, lucid and coherent material written with a readable pen, and the value of this service should not be underestimated. It is regrettably the case that, save for a few overworked legal specialists, income tax law and procedure is increasingly avoided in legal practice and increasingly is becoming the exclusive field of accountants and other experts. This is a development that is unfortunate not merely because it deprives lawyers of a legitimate source of gainful employment but because there is no sphere where a legal training and a legal approach are more valuable attributes for proper advice and for accurate conclusions. Few income tax problems are matters of mathematical calculation and adjustment; if capable of such treatment it can be said that there is no problem. They normally involve a close consideration of recondite and difficult statutory provisions reinforced by a comprehension of the general principles involved.

It is the special quality of Dr. Farnsworth's book that it brings into relief the purely legal nature of the subject and indicates the appropriate method of approach. It has the added virtue that it emphasises (although by inference rather than statement) the important truism that there is an income tax aspect in almost every present-day legal transaction and that a practitioner who is not equipped with a working knowledge of the subject is dangerously handicapped in performing his function. This truism is still too little realised. The only legal examining body that includes income tax law in its syllabus is the Law Society, and even then to the extent only of a couple of questions out of a total of seventy-two in the Solicitors' Final. It should by now be included, if not as a separate subject, at least within the scope of Property and Conveyancing courses in every examination for a legal qualification and an improved literature along the lines of the present book would contribute to such an end.

The title of this book is deceptive. It is not a general case book of income tax law but a series of essays on particular problems. Each of the subjects dealt with is one of constant practical concern and, to the credit of the author, they include matters generally credited as obscure and difficult. All the essays are richly informative and replete with every relevant authority. If it is possible to discriminate between them, the reviewer found of especial value the discussion of 'Fact' or 'Law' in connection with appeals from the findings of Commissioners which, in theory at least, are restricted to findings of law. This dichotomy has evolved some judgments of a highly technical and artificial character best exemplified in *Inland Revenue Commissioners v. Lysaght* ([1928] A.C. 234), a case which receives exhaustive and clarifying consideration in Dr. Farnsworth's pages. Another essay of great value is 'The

Residence and Domicil of Corporations'. This is a topic of constant recurrence and complexity and a perusal of this author's treatment, while it will not resolve every problem, will at least furnish the clearest statement of principle that has yet been published.

In conclusion one short note of warning might be sounded. It is the outstanding quality of this book that the author finds a thread of principles upon which to string the apparently conflicting cases and regulations that abound throughout the subject. Nevertheless, if it conveys an impression that a principle can always be found (and the author makes no such assertion) it may well lead to mortal error. It is an unhappy fact that empiricism is the only rule for many tax problems and until the long awaited codification (which our great-grandchildren may see) will remain so.

A. GOODMAN.

CHALMERS' LAW OF BILLS OF EXCHANGE. Eleventh edition by His Honour Judge BATT. (London: Stevens & Sons, Ltd. 1947. xlviii and 423 pp. (with index). 35s. net.)

AFTER a gap of some sixteen years it is good to see a new edition of this standard textbook and to be able to welcome Judge Batt as the new editor. While Professor of Commercial Law at Liverpool University, Judge Batt established a reputation as an authority on the law of negotiable instruments, and comes accordingly more than usually well equipped to his editorial duties.

These have been very onerous for not only is the gap since the last edition unusually long, but there have been an exceptionally large number of important decisions during the period. The work of incorporating these has been skillfully done, and one might well say little more except to draw attention to an innovation in the shape of heavily printed sectional headings, which is an improvement. I will, however, offer some comments—of detail, but of important detail.

The form of this book—all the works of the late Mr. McKenzie Chalmers took the form of illustrative cases and notes to sections of the statute with which he is dealing—does not give satisfactory scope to the sort of discussion of the more important cases which we should like to see and which Judge Batt is so well qualified to give. All the notes are highly condensed, being intended to put practitioners upon the track of cases rather than to expound the law on difficult problems. Chalmers' most interesting work from the student's point of view lies in his prefaces and appendices. I think, however, that Judge Batt would have been justified in going rather further in expanding some of the notes than he has for the most part done, and he realises this himself in some cases where he very much improves the original notes.

To take a few instances, the problem of negligence under section 82 calls for much more elucidation than it receives in the cursory note, and recent leading cases, such as *Savory v. Lloyds Bank, Ltd.*, [1933] A.C. 201, furnish the opportunity. Again, the problem raised by *Macdonald & Co. v. Nash & Co.*, [1924] A.C. 625, is very puzzling and deserves more than a footnote, especially as two recent cases cited help to elucidate it. The discussion of the effect of marking a cheque 'account payee' which is fuller overlooks the important contribution to this topic made by the late Sir John Paget, K.C., in his *Law of Banking*, in which he advances strong arguments against Judge Batt's view that the presence of these words on a cheque puts the paying bank on inquiry.

The following further points may perhaps be noticed. The recent case of *Bank of Baroda v. Punjab National Bank*, [1944] A.C. 176, naturally gives occasion to an extension of the note on 'marked' cheques. This note has never been very clear as to either the method or purpose of the so-called 'marking' or 'certification', and the present revised note does not remedy the defect. Incidentally it would have been worth noticing that the efforts of the Institute of Bankers have prevented this practice from developing in England.

The note about *Slingsby v. District Bank*, [1932] 1 K.B. 544, at footnote 84, p. 202, might prove misleading, as the decision does not go further than to hold that leaving a gap between the name of the payee and the words 'or order' was not negligence in the particular circumstances. Again is it so clear that *Morris v. Bethell* (1869), L.R. 5 C.P. 47, is overruled by *Greenwood v. Martins Bank*, [1933] A.C. 51, as is suggested at p. 73, footnote 57? The *Greenwood Case* turns upon the duty of a customer to his banker, which is not the same thing as that of a person whose acceptance is forged towards a holder. It may be argued forcibly that *Morris v. Bethell* is more within the *ratio decidendi* of *Scholfeld v. Londesborough*, [1896] A.C. 514. And at p. 186 is Nougier still an authority on 'modern French law'? Perhaps so, in contrast with Pothier. Finally Judge Batt evidently regards section 19 of the Stamp Act, 1853, as unrepealed. This may be correct, but the judgment of Slessor, L.J., to the contrary in *Carpenters' Co. v. British Mutual Bank*, [1938] 1 K.B. 511, to the contrary is more than an *obiter dictum* and should have been mentioned.

These matters are all somewhat technical and attention has only been called to them in the hope of amendment in the next edition. They indicate but slight blemishes upon a valuable and much appreciated piece of work.

C.

THE CONTRACT OF SALE OF GOODS. Second edition. By R. A. EASTWOOD, LL.D., of Gray's Inn and the Northern Circuit, Barrister-at-Law, Professor of English Law at the Victoria University, Manchester. (London: Butterworth & Co. (Publishers), Ltd. 1946. viii and 166 pp. 12s. 6d. net.)

IN many cases reviewing is a dull task; a chore, for which the sole *solatium* is a gratuitous copy of the work in question. It has, however, been a positive pleasure to review this excellent little book.

The work first appeared in 1929, being one of a proposed series of related works on commercial law. In the preface to the present edition Professor Eastwood states that the book is 'designed primarily for the use of those law students who wish to study the Contract of Sale of Goods as a special and, therefore, comparatively advanced subject'. That it fulfils such avowed purpose (though not altogether satisfactorily), no one could deny; but this is not, it is considered, the book's most important mission. Lay students (if one may use this expression to denote those reading for degrees in Commerce, etc.) are but poorly catered for in the matter of textbooks on law, and it is in relation to them that this work occupies an exceptional, if not unique, rôle. The reviewer, as a teacher of Commercial law, has been considerably embarrassed by the dearth of short, explanatory works on the various topics which fall within the scope of this subject (what textbook is one to recommend for a course of nine lectures on, say, the Bills of Exchange Act, 1882?), and it is a constant regret to him that completion of the proposed series was rendered impossible. It is fervently hoped that this review, if it is to serve any useful purpose whatsoever, will induce one of the publishing houses to undertake the publication of such a series—designed primarily for lay students, with Professor Eastwood's book as the model.

What, then, of the book itself? In pursuance of the aim that it 'should be, independently of any series, a book in itself', the author has included a new chapter on Capacity, and a new section on Frustration. Two hiatuses have thus been stopped, and that speaks for itself. It is submitted, however, that the scope of these new additions is somewhat misconceived; that it is outside the ambit of a book such as this to give what amounts almost to a general dissertation on Capacity and Frustration. It can, nay, must, be assumed that the student comes to Sale with an adequate knowledge of the general principles of Contract. The question of demarcation being inevitably a fruitful source of

contention, no suggestion will be made as to where the line should be drawn; but, as added support to the main proposition, it is perhaps not irrelevant to point out that pruning would make space available to certain sections of the Act at present omitted from this book.

The text has been brought up to date, and many of the cases decided since the first edition have been included. But there is still a tendency (particularly in the chapter dealing with the transfer of the property in the goods) to cite cases decided before the Act was passed—and this despite abundant post-1893 authority on the particular point. In regard to those sections of the Act which have been omitted altogether (or which, though dealt with, have been afforded but meagre treatment) mention may be made, *inter alia*, of sections 5, 8, and 11 (1) (c). These sections involve many important principles of law (and equity), and a book which does not deal with them at all (or which deals with them in a summary fashion only) cannot really be said to meet adequately the requirements of law students studying Sale as a special subject. (Whilst on the topic of omissions, it is noticeable that nowhere in this book is there to be found a definition of 'goods'.)

As it is conventional, apparently, for a reviewer to point out some of the inaccuracies or other aberrations which he has discovered, it would be unseemly to conclude without complying with this practice. Thus, section 4 (1) requires at least one of four (not three) conditions to be satisfied (*en passant*, is it really a sufficient explanation of the position in law of 'earnest' to say that it 'bears the same meaning as it has in everyday speech'? (p. 7)); it should be made perfectly clear that the proviso to section 14 (1) is not absolute (p. 53); 'specific' and 'ascertained' goods are not, as might appear from pages 60 and 70, synonymous; the rule on p. 47 is not altogether happy, for there can be a sale 'by description' even though the buyer has seen the goods; the explanation of 'acceptance' within section 4 (p. 7 *et seq.*) is not complete without a reference to *Re A Debtor*, [1939] Ch. 225; and it is unwise to cite *Howell v. Coupland* (p. 132), as an example of a sale of 'specific' goods, without cautioning the student that this involves giving to the word a meaning different from that laid down in the definition section.

J. D. HAYMAN.

HIRE-PURCHASE LAW. By MAURICE SHARE ('This is the Law' Series). (London: Stevens & Sons, Ltd. vii and 111 pp. 4s. net.)

MR. SHARE's excellent textbook on this subject made him an obvious candidate for the authorship of a small volume for the lay reader. His subject is one of the most difficult to explain lucidly in non-technical language, and on the whole he has achieved a success.

Where the uninitiated reader may find difficulty is with the very much potted explanation of the main principles of the law of contract and with other attempts to explain technical expressions. The use of technical expressions in such a work is unfortunate, but it is certainly difficult to write anything at all without using such terms as 'warranty' and 'conversion'. Mr. Share uses them, and attempts very compressed explanations. I do not think that he quite succeeds—the uninitiated reader would, I imagine, think that a warranty is some collateral agreement set out in some document other than that containing the main hire-purchase contract. Even at the cost of using a few more pages such important matters should be made clear.

The Act of 1938 is rather detailed and difficult. Mr. Share covers the ground in detail which is no doubt necessary if a lay reader relying on the book is not to be misled. The inevitable result, however, is to give a certain

impression of complexity. For a reader who is prepared to take care, however, the exposition is clear enough and complete, and is aided by the use of simple mathematical illustration.

Perhaps the most valuable part of the volume is a series of chapters on competing claims to goods which are the subject-matter of a hire-purchase contract, *e.g.*, by landlords, trustees in bankruptcy, liens, judgment creditors, subsequent purchasers, and moneylenders under bills of sale.

There is also a useful little summary of the main wartime emergency rules affecting dealings on hire-purchase and credit sale terms.

C.

THE GOVERNMENT OF TRINIDAD AND TOBAGO: LAW OF THE CONSTITUTION. By CHARLES REIS. Third edition. (Trinidad: Yuille's Printerie, Ltd. London: Sweet & Maxwell, Ltd. 1947. xxxii and 336 pp. 15s.)

THE new edition of this book makes interesting reading, and is very welcome, coming, as it does, at a time when colonial affairs are, very properly, receiving considerable attention. Mr. Reis' work enables the reader to obtain a good impression of the constitutional position, from the legal point of view, of Trinidad, a colony which has been a member of the British 'family of nations' for just over 150 years, and it should be read by everybody interested in colonial affairs.

The book, however, contains statements some of which are inaccurate, and others not meeting with the full approval of the present reviewer. Thus, it is not correct to say (p. 4) that with the coming into operation of the 1925 English property legislation the King has ceased to be the absolute owner of all land in England. Here, as in Trinidad, the fee simple estate is the largest estate known to the law, and it is really equivalent to absolute ownership, but the law that the King is the only absolute owner remains unchanged. Again, the Secretary of State for the Colonies nominates, not appoints, the person to be Governor (p. 22). Since the Administration of Justice (Miscellaneous Provisions) Act, 1938, the four prerogative writs enumerated on p. 172 have been orders. There is no such English case as *Re Mowsley* (1946)—see p. 186. The author must mean *Stafford v. Minister of Health* [1946] 1 K.B. 621, the land affected by that case being situated at Mowsley. The statement on p. 191 that since 1931 the development of Dominion autonomy has been accompanied by the creation of distinctive Dominion nationalities should have made it clear that such nationalities are 'local'. See, *e.g.*, *Murray v. Parkes*, [1942] 2 K.B. 123. The British Nationality Bill, 1948, will, when it becomes law, make important changes in the law of nationality, and Cmd. 7326 (1948) is a useful summary of the main provisions of the Bill.

Since *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347, the law is that an alien may owe allegiance even if he is not resident within the realm, and the statement on p. 254 should be extended accordingly, and it is also suggested that on the same page it should have been made clear that natural allegiance is owed not only by natural-born British subjects but also by persons deemed to be natural-born British subjects. The new constitution for the Gold Coast which came into operation on March 29, 1946, provides for a majority in the Legislative Council of elected members over official and nominated members, so that this colony should have been included in category (4), and not (3), on p. 325.

It is interesting to note that the colonial Attorney-General is *ex officio* a member of the Executive Council—p. 44—(whereas our own Attorney-General is very rarely a member of the Cabinet) and of the Legislative Council—p. 76; that the 1924-45 Orders-in-Council provide for annual meetings of the Legislative Council, *i.e.*, for 'annual Parliaments'—p. 88; that an elected member

of the Legislative Council can resign his seat by written notice (p. 100), a more sensible arrangement than the United Kingdom farce of a Member of Parliament having to apply for the Stewardship of the Chiltern Hundreds; that any person found guilty of contempt or of breach of the privileges of the Legislative Council may be sent to prison for a term not exceeding three months (p. 147), which is a wider power than that possessed by the House of Commons, which cannot commit for a fixed term, as a prisoner is automatically released when the House is prorogued; that members of the Legislative Council may not put oral questions without the President's leave (p. 156); that where there is no person entitled to the testator's estate, the executor is entitled to such part of the residuary estate as consists of personalty (p. 220), the position thus appearing to be the same as it was in England prior to the Executors Act, 1830, the repeal of that Act by the Administration of Estates Act, 1925, not having restored the pre-1830 law (*Re Skeats*, [1936] Ch. 683); that legal proceedings (presumably criminal proceedings) in respect of minor offences against the Central Water Distribution Authority Ordinance can be settled out of court, one-half of the compensation money paid by the accused person being handed over to the Government (pp. 231-2); that women cannot serve as jurors (p. 269); and that the Public Authorities Protection Ordinance provides that legal proceedings must be commenced against a public authority within three months next after the act complained of (p. 317) as against twelve months in the United Kingdom.

In addition to the items mentioned in the Corrigenda on p. 319, the following errors were noted, the second word being, in each case, the correct one. Page 6, line 12, 'interferred', 'interfered'; p. 13, line 27, and p. 14, line 2, 'Misprison', 'Misprision'; p. 53, line 18, a bracket should appear after '1933'; p. 56, line 20, 'practice', 'practise'; p. 94, third line from the bottom, 'of' should be inserted after 'purpose'; p. 135, line 25, 'territority', 'territory'; p. 141, line 20, 'extend', 'extent'; p. 158, line 16, 'internal', 'interval'; p. 172, line 8, 'have', 'has'; p. 173, line 21, 'Farrell, J.', 'Farwell, L.J.'; p. 173, line 28, 'insistance', 'insistence'; p. 191, first line, 'cannon', 'canon'; p. 197, line 23, 'defense', 'defence'; p. 225, first line, 'Lands', 'Land'; p. 227, line 8, 'Gazettee', 'Gazette'; p. 233, third line from bottom, 'ocured', 'occurred'; p. 248, line 22, 'a', 'an'; p. 250, line 12, 'applies', 'apply'; p. 255, line 22, 'occurance', 'occurrence'; p. 256, third line, 'Act', 'Acts'; p. 277, line 7, 'ocurance', 'occurrence'; p. 278, line 14, 'indentity', 'identity'; p. 282, second line from bottom, 'Subject', 'subject'; p. 291, line 20, 'is', 'in'; p. 297, line 6, 'to' should be inserted after 'granted'; p. 316, line 18, 'resepet', 'respect'; p. 325, line 9, 'seat', 'sat'.

Referring to the Corrigenda on p. 319, there is no reference on p. 136 to the Court of Survey. There is a ninth edition of Dicey's *Law of the Constitution* (see p. 2) and the seventh edition of Ridges' *Constitutional Law* is now known as *Keith's Constitutional Law* (p. 190).

R. C. FITZGERALD.

THOMAS & HOOD PHILLIPS' LEADING CASES IN CONSTITUTIONAL LAW.
Eighth edition. By O. HOOD PHILLIPS, M.A., B.C.L. (oxon.),
Barrister-at-Law, Barber Professor of Jurisprudence in the
University of Birmingham. (London: Sweet & Maxwell, Ltd.
1947. xxviii and 486 pp. 21s. net.)

THIS is the eighth edition of *Thomas & Bellot*. Very appropriately the name of Professor Hood Phillips now appears in the title, for the learned editor has in effect produced a new book. Of the 142 cases incorporated in the previous edition he has discarded no fewer than eighty-five, and he has replaced them by fifty-one others. He has drastically pruned the old luxuriant editorial notes and (apart from a few of the oldest cases) he has done away altogether

with one irritating feature of the book which earlier editors allowed to persist, viz., the practice of giving précis of judgments instead of verbatim extracts. His general method of presentation is to give an accurate statement of the essential facts and passages from the leading judgments, followed by a succinct editorial note. These notes are of value to the student; many of them include references to recent literature, to projected legislative changes and to the relevant pages of *Chalmers and Hood Phillips*.

Professor Hood Phillips is to be congratulated on having revived a work which many of us had thought to be moribund. The newly-included cases have been well chosen to illustrate the points they are designed to stress. The only substantial criticism must be directed against the relative emphasis he has placed on the different topics comprised in his amorphous subject. For, whilst the reviewer whole-heartedly agrees with the opening words of Professor Hood Phillips' preface—'In recent years the emphasis in the study of English Constitutional Law has shifted rather from the Royal prerogative and rights of the subject towards the statutory powers of various kinds of public authorities'—it is not always evident that the editor has in fact given sufficient weight to this vitally important part of Constitutional Law. Thus it is rather surprising to find seven cases on Treason and Sedition, but not one really modern case on the judicial review of the so-called 'quasi-judicial' powers of Ministers (e.g., the 'natural justice' cases arising out of the Housing Acts). An extract from Lord Greene, M.R.'s judgment in *Johnson v. Minister of Health*, [1947] 2 All E.R. 395, might now help to fill this gap. It would have been well worth while to give one or two further illustrations of the ultra vires doctrine. The necessary space might perhaps have been found by eliminating the cases on judicial precedent and reducing the nineteen pages devoted to *Viscountess Rhondda's Case* and the twelve devoted to *Porter v. Freudenberg*.

Minor suggestions are (i) that *Johnstone v. Pedlar* should be transferred to the section on Act of State, and (ii) that the note on p. 169 should be amended to make it clear that a friendly alien may be deported under statutory powers, whether or not he is a fugitive criminal.

In the absence of an up-to-date edition of *Keir and Lawson, Thomas and Hood Phillips* is already occupying the vacant space on many a student's bookshelf. Its deserved popularity would be greatly enhanced if it were found possible to include a short selection of leading cases on the Commonwealth and Empire in the next edition.

S. A. DE SMITH.

BELL'S SALE OF FOOD AND DRUGS. Twelfth edition. By R. A. ROBINSON, O.B.E., Barrister-at-Law. (London: Butterworth & Co. (Publishers), Ltd. 1947. xlviii, 529 and 71 pp. 30s. net.)

THE rapidity with which new editions of *Bell* are now called for testifies both to its importance for administrators and practising lawyers and to the formidable volume of subordinate legislation issuing from the Ministry of Food. The present edition more than maintains the standard set by its eleven predecessors. It includes a useful introduction explaining the effect of the surviving emergency legislation and the Regulations and Orders made thereunder, together with the recent alterations in administrative responsibilities. A large number of new Orders are printed in full or concisely summarised. Supplements will be issued by the publishers during what will no doubt be the short interval before the next edition appears.

S. A. DE SMITH.